CLERK'S COPY

12913

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 848. 97.

MICHAEL F. DOOLEY, AS RECEIVER OF THE FIRST NATIONAL BANK OF WILLIMANTIC, CONNECTICUT, PLAINTIFF IN ERROR,

vs.

JAMES PEASE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED JULY 14, 1899.

(17,462.)



12914

(17,462.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 348.

MICHAEL F. DOOLEY, AS RECEIVER OF THE FIRST NATIONAL BANK OF WILLIMANTIC, CONNECTICUT, PLAINTIFF IN ERROR,

vs.

JAMES PEASE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from the circuit court of the United States for the northern district of Illinois	*a*	1
Caption	*b*	1
Præcipe for summons	2	2
Bond for costs	2	2
Declaration	3	3
Summons	4	4
Marshal's return	4	4
Stipulation as to time to file pleas	5	4
Order of court October 8, 1895, as to time to file pleas	5	5
Stipulation as to pleadings	6	5
Order of court October 28, 1895, as to pleadings	6	6
Plea	7	6
Stipulation (jury waived)	8	7
Order of court February 4, 1897, hearing	8	7

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 12, 1900.

	Original	Print
Order of court February 5, 1897, hearing	9	8
Opinion	9	8
Special findings of facts	11	9
Judgment	21	18
Petition for writ of error	22	19
Assignment of error	23	19
Order allowing writ of error	24	20
Bond on writ of error	24	20
Writ of error	25	21
Clerk's certificate	26	22
Citation	27	22
Appearance for plaintiff in error	28	23
Appearance for defendant in error	29	24
Order enlarging time to file briefs	29	24
Order designating Judge Bunn to sit	30	24
Order setting cause for hearing	31	25
Order taking cause under advisement	31	25
Opinion	33	25
Judgment	37	28
Writ of error	39	29
Return on writ of error	41	30
Clerk's certificate	43	30
Citation and service	44	30

a *Transcript of Record.*

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1897.

MICHAEL F. DOOLEY, as Receiver of the First National Bank of Willimantic, Connecticut, Plaintiff in Error,
vs.
JAMES PEASE, Defendant in Error.
} No. 472.

Mr. Hiram T. Gilbert, counsel for plaintiff in error.
Mr. A. W. Green, Mr. Henry S. Robbins, counsel for defendant in error.

In error to the circuit court of the United States for the northern district of Illinois, northern division.

Transcript of record filed December 15, 1897. Printed record filed Mar. 11, 1898.

OLIVER T. MORTON, *Clerk.*

b UNITED STATES OF AMERICA,
Northern District of Illinois,
Northern Division,
} *ss:*

In the United States Circuit Court for the Northern District of Illinois, Northern Division.

MICHAEL F. DOOLEY, as Receiver of the First National Bank of Willimantic, Connecticut,
vs.
JAMES PEASE.
} 23796. Trespass.

Hiram T. Gilbert, attorney for Michael F. Dooley, receiver of the First National Bank of Willimantic, Connecticut.
Green, Robbins & Honore, attorneys for James Pease.

1 *Pleas.*

Pleas in the circuit court of the United States for the northern district of Illinois, northern division, begun and held at the United States court-room in the city of Chicago, in said district and division, before the Honorable Peter S. Grosscup, district judge of the United States for the northern district of Illinois, on Friday, the twenty-eighth day of May, in the year of our Lord one thousand eight hundred and ninety-seven, of the December term of said court, 1896, and of our Independence the one hundred and twenty-first year.

S. W. BURNHAM, *Clerk.*

MICHAEL F. DOOLEY, as Receiver of the First National Bank of Willimantic, Connecticut,
vs.
JAMES PEASE. } 23796.

Be it remembered that on this day, to wit, twenty-fifth day of June, 1895, came the plaintiff in said entitled cause, by his attorneys, and filed in the clerk's office of said court his præcipe for summons and bond for costs, which said præcipe and bond for costs are respectively in the words and figures following, to wit:

2 *Præcipe.*

UNITED STATES CIRCUIT COURT,
Northern District of Illinois, Northern Division, } *ss:*

MICHAEL F. DOOLEY, as Receiver of the First National Bank of Willimantic, Connecticut,
vs.
JAMES PEASE. } Trespass. Damages, $50,000.

To the clerk of said circuit court:

You will please issue a summons in the above-entitled cause directed to the marshal of the northern district of Illinois, to execute and returnable to the October term of said court.

DUNCAN & GILBERT,
Plaintiff's Attorneys.

(Endorsed:) Filed June 25, 1895. S. W. Burnham, clerk.

Bond for Costs. Filed June 25, 1895.

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } *ss:*

Circuit Court, July Term, A. D. 1895.

MICHAEL F. DOOLEY, as Receiver of the First National Bank of Willimantic, Connecticut,
vs.
JAMES PEASE. } In Trespass.

I enter myself security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by the plaintiff hereby agree and stipulate that execution may issue against my

property for all costs not exceeding two hundred dollars taxed against the plaintiff.

Dated this 25th day of June, A. D. 1895.

HIRAM T. GILBERT.

(Endorsed:) Filed June 25, 1895. S. W. Burnham, clerk.

3 On the same day, to wit: the twenty-fifth day of June, 1895, came the plaintiff in said entitled suit, by his attorneys, and filed in the clerk's office of said court his declaration, which said declaration is in the words and figures following, to wit:

Declaration. Filed June 25, 1895.

Declaration.

CIRCUIT COURT OF THE UNITED STATES, } ss:
Northern District of Illinois, Northern Division, }

Michael F. Dooley, as receiver of the First National Bank of Willimantic, Connecticut, who is a citizen and resident of said State of Connecticut, plaintiff, by Duncan & Gilbert, his attorneys, complains of James Pease, who is a citizen and resident of the State of Illinois, defendant, of a plea of trespass. For that the defendant on, to wit: the 20th day of May, A. D. 1895, with force and arms, etc., in the district aforesaid, seized, took and carried away the goods and chattels, to wit: the silk dress goods, lining, braid, fish lines, sewing silk, buttons, and other goods of the plaintiff, being the stock of goods then being in the store known as numbers 213 and 215 Fifth avenue in the city of Chicago, of the value of fifty thousand dollars, and converted and disposed of the same to his own use, and other wrongs to the plaintiff then and there did, against the peace of the people of the State of Illinois, and to the damage of the plaintiff of fifty thousand dollars, and therefore he brings his suit, etc.

DUNCAN & GILBERT,
Plaintiff's Attorneys.

(Endorsed:) Filed June 25, 1895. S. W. Burnham, clerk.

4 On the same day to wit: the twenty-fifth day of June, 1895, a summons issued out of the clerk's office directed against the defendant in said entitled cause, which said summons, together with the marshal's return thereon endorsed, is in the words and figures following, to wit:

Summons of. *Filed June* 25, 1895.

Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, } ss.
Northern District of Illinois, Northern Division, }

The United States of America to the marshal of the northern district of Illinois, Greeting:

We command you to summon James Pease, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto Michael F. Dooley, as receiver of the First National Bank of Willimantic, Connecticut, of a plea of trespass on the case to his damage, as is alleged, of fifty thousand dollars, and have you then and there this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States of America, at Chicago aforesaid, this 25th
[SEAL.] day of June, in the year of our Lord one thousand eight hundred and 95, and of our Independence the 119th year.

S. W. BURNHAM, *Clerk.*

Marshal's Return.

I have served the within writ by reading the same to and within the presence and hearing of James Pease therein named on the 28th day of June, 1895.

J. W. ARNOLD,
U. S. Marshal.
By GEO. N. JONES, *Deputy.*

(Endorsed:) Filed June 28, 1895. S. W. Burnham, clerk.

5 Afterwards, to wit: on the ninth day of October, 1895, came the parties to the above-entitled cause, by their respective attorneys, and filed in the clerk's office of said court a certain stipulation, which said stipulation is in the words and figures following, to wit:

Stipulation. Filed Oct. 9, 1895.

Stipulation.

United States Circuit Court, Northern District of Illinois, Northern Division.

DOOLEY, Receiver, }
vs. } 23796, 738. Trespass.
JAMES PEASE. }

It is hereby stipulated by and between the parties to the above-entitled cause, by their attorneys, that the defendant shall have

up to and including October 29, 1895, in which to file his pleas herein.

DUNCAN & GILBERT,
Attorneys for Plaintiff.
GREEN, ROBBINS & HONORE,
Att'ys for Defendant.

(Endorsed:) Filed Oct. 9, 1895. S. W. Burnham, clerk.

On the same day, to wit: the eighth day of October, in the July term of said court, 1895, in the record of proceedings thereof in said entitled cause before the Hon. John W. Showalter, circuit judge, appears the following entry, to wit:

Order of October 8, 1895.

MICHAEL F. DOOLEY, Rec'r, vs. JAMES PEASE. } 23796.

It is stipulated and ordered that the defendant be allowed until October 29, 1895, to file pleas.

6 Afterwards, to wit: on the twenty-eighth day of October, 1895, came the parties to the above-entitled cause, by their attorneys, and filed in the clerk's office of said court a certain stipulation, which said stipulation is in the words and figures following, to wit:

Stipulation. Filed Oct. 28, 1895.

Stipulation.

Circuit Court of the United States, Northern District of Illinois, Northern Division.

MICHAEL F. DOOLEY, Receiver, etc., vs. JAMES PEASE. } 23795, 738. Trespass.

It is hereby stipulated by and between the parties to the above-entitled cause that the above-named defendant shall plead in said cause the general issue only, and shall not be required to plead any other plea, and that said defendant may interpose under said plea of general issue any and all defences he may have to said action in all respects as though such defences, and each and all of them, had been specifically pleaded.

DUNCAN & GILBERT,
Attorneys for Plaintiff.
GREEN, ROBBINS & HONORE,
Attorneys for Defendant.

(Endorsed:) Filed Oct. 28, 1895. S. W. Burnham, clerk.

On the same day, to wit: the twenty-eighth day of October, in the July term of said court, 1895, in the record of proceedings thereof in said entitled cause before the Honorable John W. Showalter, circuit judge, appears the following entry, to wit:

Order of October 28, 1895.

MICHAEL F. DOOLEY }
vs.
JAMES PEASE. }

It appearing to the court that a stipulation has been entered into by and between the parties to this cause as follows, to wit:

It is hereby stipulated by and between the parties to the
7 above-entitled cause that the above-named defendant shall plead in said cause the general issue only, and shall not be required to plead any other plea, and that said defendant may interpose under said plea of general issue any and all defences he may have to said action in all respects as though such defences, and each and all of them, had been specifically pleaded.

Now, therefore, it is hereby ordered that in pursuance of the above stipulation the defendant shall plead in this cause the general issue only, and shall not be required to plead any other plea, and that said defendant may interpose at the trial of this cause, under said plea of general issue, any and all defences he may have to said action, in all respects as though said defences, and each and all of them, had been specifically pleaded.

On the same day, to wit: the twenty-eighth day of October, 1895, came the defendant in said entitled cause, by its attorneys, and filed in the clerk's office of said court its plea of general issue, which said plea is in the words and figures following, to wit:

Plea. Filed Oct. 28, 1895.

Plea.

Circuit Court of the United States, Northern District of Illinois, Northern Division.

MICHAEL F. DOOLEY, Receiver, etc., }
vs. } Trespass. 23795, 738.
JAMES PEASE. }

And the said defendant, James Pease, by Green, Robbins and Honore, his attorneys, comes and defends the force and injury, when, etc., and says that he is not guilty of the said supposed trespass above laid to his charge, or any or either of them, in manner and form as the plaintiff has above thereof complained against him; and of this the said defendant puts himself upon the country, etc.

GREEN, ROBBINS & HONORE,
Attorneys for Defendant.

(Endorsed:) Filed Oct. 28, 1895. S. W. Burnham, clerk.

8 Afterwards, to wit: on the seventh day of December, 1896, came the parties to the above entitled cause by their attorneys and filed in the clerk's office of said court a certain stipulation which said stipulation is in the words and figures following, to wit:

Stipulation. Filed Dec. 7, 1896.

Stipulation.

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division.

Circuit Court Thereof, December Term, A. D. 1896.

WILLIAM F. DOOLEY, Receiver of the First National Bank of Willimantic, Conn.,
vs.
JAMES PEASE. } Trespass. Gen. No., 23796.

It is hereby stipulated and agreed by and between the parties hereto that a jury shall be waived in the above-entitled cause, and that it may be submitted to the court to be tried without the intervention of a jury.

H. T. GILBERT, *Attorney for Plaintiff.*
GREEN, ROBBINS & HONORE,
Attorneys for Defendant.

(Endorsed:) Filed Dec. 7, 1896. S. W. Burnham, clerk.

Afterwards, to wit: on the fourth day of February, 1897, in the December term of said court, 1896, in the record of proceedings thereof in said entitled cause before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

Order of February 4, 1897.

MICHAEL F. DOOLEY, Receiver, etc.,
vs.
JAMES PEASE. } 23796. Case.

Now on this day come the parties by their attorneys, and a jury having been waived by stipulation, this cause is now submitted to the court for trial and a part of the evidence being heard when the hour for adjournment having arrived the further trial of this cause is postponed until tomorrow morning.

9 Afterwards, to wit, on the fifth day of February, 1897, in the December term of said court, 1896, in the record of proceedings thereof in said entitled cause before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

Order of February 5, 1897.

MICHAEL F. DOOLEY, Rec'v'r,
vs.
JAMES PEASE. } Case.

Now again come the parties, by their attorneys, and the trial of this cause is resumed, and the same having been heard to conclusion, together with the arguments of counsel, and the court not being sufficiently advised takes time to consider.

Afterwards, to wit, on the sixth day of March, 1897, there was filed in the clerk's office of said court an opinion by Judge Grosscup, which said opinion is in the words and figures following, to wit:

Opinion. Filed March 6, 1897.

Opinion.

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } *ss:*

In the Circuit Court of the United States, Northern District of Illinois, Northern Division.

DOOLEY
vs.
PEASE.

Opinion.

Rendered by Judge Grosscup on March 1, 1897 (orally).

I have prepared a long finding of facts, which I will not attempt to recapitulate. My conclusion in this case is due to my holding a simple proposition of law, and I can probably state it by a very short résumé of the facts.

The complainant is the receiver of a national bank that had a large claim of over two hundred thousand dollars against a silk company in Connecticut. The silk company itself was in financial difficulties and was about to fail. The president of the com-
19 pany, who was also its acting general manager, having been elected to that place some two or three years before and not having been re-elected, but continuing to act, came to Baltimore, Chicago and New York, and executed a bill of sale of their stock of goods in these cities respectively to the receiver of the bank. He knew at the time that his silk company was on the point of failing, that an application would soon be made for the appointment of a receiver, and it would go into the hands of a receiver.

The circumstances are such that this discloses a clear case of an attempt upon the part of the president and acting general manager of a company that is no longer to be a going concern, but is to be-

come and is already an insolvent concern, and is to become a defunct concern, to execute a preference in favor of one of its creditors.

I hold that in the absence of special authority conferred upon the president or general manager for that purpose by the directors, he has no power to make any such preference. The president and general manager has power to conduct the affairs of the company as a going concern, and do everything consistent with its affairs as a going concern, but when it comes to preferring creditors of a concern to be wound up, the owners of the property are the stockholders through their board of directors, and they have not by the mere election of a man to the presidency of the company authorized him to discriminate between their creditors.

There will therefore be, in addition to this special finding of facts, a general finding in favor of the defendant, the sheriff, who seized the goods under attachment writs.

(Endorsed:) Filed March 6, 1897. S. W. Burnham, clerk.

11 On, to wit: the twenty-eighth day of May, 1897, there was filed in the clerk's office of said court the following special findings:

Special Findings. Filed May 28, 1897.

Special findings.

Circuit Court of the United States, Northern District of Illinois, Northern Division.

MICHAEL F. DOOLEY, as Receiver of the First National Bank of Willimantic, Connecticut,
vs.
JAMES PEASE, Sheriff, etc. } Trespass.

A trial by jury having been waived in this cause by stipulation in writing signed by the parties, by their attorneys, and the issues having been submitted to me for trial, I find the facts to be as follows:

1. The plaintiff is now and since the 23rd day of April, A. D. 1895, has been the receiver of the First National Bank of Willimantic, a national banking association organized under the laws of the United States, having been duly appointed as such receiver by the Comptroller of the Currency on the 23rd day of April, 1895, under and in pursuance of the laws of the United States, and said plaintiff at the time of the commencement of this suit was and still is a resident and citizen of the State of Connecticut.

2. The defendant is and ever since the first Monday of December, 1894, has been the sheriff of the county of Cook in the State of Illinois, and during all that time has been and still is a resident and citizen of said State of Illinois.

3. The Natchaug Silk Company was on the 25th day of April

1895, a corporation organized under the laws of the State of Connecticut, engaged in the business of manufacturing silk and buying and selling and dealing generally in such real and personal estate as might be necessary to the successful prosecution of said business, said corporation having been duly organized as aforesaid in the year 1887, and having carried on said business during all said time.

4. The goods in controversy in this case belonged, prior to April 25, 1895, to the Natchaug Silk Company, a Connecticut corporation.

12 5. The defendant, on May 20, 1895, was sheriff of Cook county, Illinois, and on that date levied upon, seized and took possession of the goods described in the plaintiff's declaration together with certain other goods, under a writ of attachment for the sum of $14,786.53 duly issued out of the circuit court of Cook county, Illinois, at the suit of Morimura, Arai *et al. vs.* said Silk Company, and he again levied upon said goods on May 24, 1895, under a like writ for the sum of $8,193.47, duly issued out of said circuit court at the suit of China & Japan Trading Company, Limited (a New York corporation) against said Silk Company. Each of said attachment suits was duly prosecuted to judgment and judgments were entered therein for the amount of said claims respectively and special executions were ordered issued to said sheriff in each of said suits for the amounts of said judgments against the property attached. The action of said sheriff was in all respects legal and his seizure of said goods was justifiable and proper if on May 20, 1895, said goods still belonged to said silk company or were entitled to be treated by said attaching creditors as the goods of said silk company. Said levy was made in the absence of the said H. L. Stanton, hereinafter mentioned, who returned on the following day and informed said sheriff that said stock of goods belonged to the plaintiff and that he, said Stanton, held them as agent of the plaintiff; but the said sheriff retained the said goods and no part thereof was ever returned to the plaintiff, but, on the contrary, said sheriff did, on June 10, 1895, pursuant to an order of the superior court of Cook county, Illinois, in the suit of Harold F. Haddon *et al. vs.* The Natchaug Silk Company *et al.*, turn over the possession of the goods levied upon to said Henry L. Stanton, who had, upon June 8, 1895, been appointed receiver of said goods by said court in said cause, which receiver afterwards sold said goods in the usual course of said business pursuant to the further orders of said court. The plaintiff, however, was not a party to said suit of Harold F. Haddon *et al. vs.* The Natchaug Silk Company *et al.*

6. The Natchaug Silk Company was originally organized on the 25th day of October, 1887, under the provisions of the laws of the State of Connecticut, then in force, authorizing and regulating the formation of stock corporations, and subsequently on the 12th day of June, 1889, a special act of the assembly of the State of Connecticut was passed in and by which it was declared that said Natchaug Silk Company should have and enjoy its corporate franchise and

all the rights and privileges in said act granted for the pur-
13 pose of manufacturing and dealing in all kinds of silk, cotton, mohair, wool and all articles composed wholly or in part of silk, cotton, leather, wool or other substance and to do such other things as were incident to the prosecution of said business and to exercise such mercantile powers as might be convenient and necessary for the successful prosecution of said business. Said act further provided that the stock, property and affairs of said corporation should be managed by its directors, a majority of whom, when convened in accordance with the by-laws, should constitute a board for the transaction of business, and that the president and directors should have power to appoint or employ from time to time a secretary, treasurer and such other officers, agents, mechanics and laborers as they might deem necessary and proper. The act further provided that the then existing by-laws of said corporation should continue in force until the same should be altered or repealed by a vote of the stockholders, and that said stockholders should have power to alter or repeal said by-laws and to make or establish such other by-laws, rules and regulations not inconsistent with the laws of said State or of the United States as they might deem expedient for the management of the affairs of said corporation.

The third by-law adopted by the corporation on the 29th day of October, 1887, is as follows:

"The president shall preside at all meetings of the stockholders of said company when present, and in his absence the meeting shall be called to order by the secretary and a president *pro tem.* be appointed. He shall also perform all duties especially required of him by the statute laws of this State, but his charge of the executive business of the company shall be subject to the control of the directors."

At the annual stockholders' meeting on the 3rd day of February, 1891, the following amendment to the by-laws was adopted:

"The board of directors shall annually elect a general manager, who shall have entire charge of the business and affairs of said company, subject to the order and approval of the board of directors."

The foregoing by-laws continued in force down to the time of the suspension by the corporation of its business and the appointment of its receiver.

Said two by-laws and said provisions above stated in the said act of the assembly of Connecticut are the only provisions of the charter of said corporation or of its by-laws necessary to be considered in determining the powers of its president or general manager.

7. On said 25th day of April, 1895, J. D. Chaffee was the presi-
dent and acting general manager of said corporation and had
14 been such president and acting general manager for more than two years prior thereto. Said Chaffee as such president and acting general manager had had entire charge of the current business and affairs of said corporation as a going concern and within the field of its activities as a going concern and had been

permitted by its board of directors to manage as he saw fit the said current business and affairs of said corporation as a going concern, as aforesaid, except that until about the 15th day of April, 1895, one O. H. K. Riseley, a member of the board of directors of said corporation who was likewise cashier of said First National Bank of Willimantic had had charge of the financial affairs of said corporation and the borrowing of money for said corporation, on which last-mentioned date said Risley died at Willimantic, in the State of Connecticut, which was the principal place of business of said corporation, and except that said Chaffee during the time he was president and general manager at various times consulted the directors in regard to hiring an extra office outside the mill and in regard to *hiring an extra office outside the mill and in regard to* insuring the accounts of the company in a liability insurance company and in regard to purchasing or mortgaging of real estate and in regard to the policy to be pursued when strikes arose among the employés in regard to reducing wages.

8. The said First National Bank of Willimantic had, as a national banking association aforesaid, been engaged for many years in the business of banking under the laws of the United States at Willimantic aforesaid, and continued to carry on said banking business until said 23rd day of April, 1895, on which date, it having become insolvent, said plaintiff was appointed as its receiver as aforesaid. At the time of such appointment of the plaintiff said Natchaug Silk Company was indebted to said First National Bank of Willimantic to an amount exceeding $200,000 for moneys theretofore loaned by said First National Bank of Willimantic to said Natchaug Silk Company to enable said Natchaug Silk Company to carry on its said business, no part of which said indebtedness has ever been paid.

9. Prior to or about the time of his appointment as such receiver the plaintiff requested of said Chaffee, as president and general manager of said Natchaug Silk Company, that said Natchaug Silk Company should give security for the payment of its indebtedness to said First National Bank of Willimantic, and said plaintiff then and there told said Chaffee that unless said security was given he, the plaintiff, would close said silk company up.

10. Immediately thereafter said Chaffee came to the city of Chicago, together with one Solomon Lucas, an attorney-at-law who had been employed by the plaintiff to look after the interests of said First National Bank of Willimantic, and executed in the name of said Natchaug Silk Company and delivered to said Lucas on behalf of the plaintiff a bill of sale of the goods and chattels described in the plaintiff's declaration, together with certain other goods and chattels which at the time of the execution of said bill of sale were owned by said Natchaug Silk Company, being the stock of goods owned by said Natchaug Silk Company and then in the store known as numbers 213 and 215 Fifth avenue in the city of Chicago, Illinois, which said bill of sale was and is in the words and figures following, to wit:

"Know all men by these presents, that the Natchaug Silk Company, of the town of Windham, in the county of Windham and State of Connecticut—party of the first part, for and in consideration of the sum of twenty thousand dollars, lawful money of the United States of America, to it in hand paid, at or before the ensealing and delivery of these presents, and divers other good and valuable considerations received of Michael F. Dooley, as receiver of the First National Bank of Willimantic of Connecticut of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and delivered, and, by these presents, do grant, bargain, sell and deliver unto the said party of the second part, all the following goods, chattels and property, to wit:

"The stock of goods owned by it the said Natchaug Silk Company and now in the store known as Nos. 213 and 215 Fifth avenue in the city of Chicago, in the State of Illinois, said stock of goods are silk goods and consists of dress goods, lining, braids, fish-lines, sewing silk and buttons.

"To have and to hold the said goods, chattels and property unto the said party of the second part, his heirs, executors, administrators, successors and assigns, to and for his own proper use and behoof, forever.

"And the said party of the first part do vouch itself to be the true and lawful owner of the said goods, chattels, and property and had in itself full power, good right, and lawful authority to dispose of the said goods, chattels and property, in manner, as aforesaid: And it does for itself and its successors, covenant and agree to and with the said party of the second part, to warrant and defend the said goods, chattels and property to the said party of the second part, his successors in office, and assigns, against the lawful claims and demands of all and every person and persons whomsoever.

"In witness whereof, it has hereunto set its hand and seal the twenty-fifth day of April, in the year one thousand eight
16 hundred and ninety-five by J. Dwight Chaffee, its president duly authorized in its name and behalf to execute and deliver this instrument at the city of Chicago, State of Illinois.

THE NATCHAUG SILK CO., [SEAL.]
By J. D. CHAFFEE, *Pres't.*

Sealed and delivered in the presence of—
H. L. STANTON."

At the time of the execution of said document said silk company was indebted to said attaching creditors in the amounts above specified.

11. Said store had for several years prior thereto been operated by said Natchaug Silk Company as a store for the sale to dealers of its manufactured goods through one H. L. Stanton, who down to said April 25, 1895, had acted as its agent for that purpose, and at the time said bill of sale was executed and delivered by said Chaffee to said Lucas said Chaffee directed said Lucas to have the said goods that were included in said bill of sale sold and the proceeds of such sale applied by said plaintiff as a payment upon the in-

debtedness of said Natchaug Silk Company to said First National Bank of Willimantic.

12. On the morning of April 26, 1895, an attorney employed by said plaintiff, called at said store, purported to take possession of said goods in the name of the plaintiff, employed said H. L. Stanton as agent of the plaintiff to sell said goods and remit the proceeds of such sales to the plaintiff, and took from said Stanton a receipt stating that he, said Stanton, had received said stock of goods from the plaintiff and was to hold the said stock as custodian and agent for the plaintiff and subject to the plaintiff's directions. Immediately thereafter said Stanton caused the said stock of goods to be insured in the name of the plaintiff, and opened a new set of books for the purpose of keeping an account of the sale and disposition of said goods and of the expenses of said Stanton in and about the making of such sale, and also made an inventory of the said goods and delivered the same to the said attorney for the plaintiff. From that date said Stanton understood himself to be acting solely as the agent of the plaintiff. A portion of the said stock of goods was sold by said Stanton to various persons to whom the said goods were billed in the name of the plaintiff and the proceeds of said sales amounting to about $7,000, were received by said Stanton and placed to the credit of the plaintiff. No change was made from April 25, 1895, until after May 20, 1895, in the sign on the outside of said store, which signs were "Natchaug Silk Company."

17 13. On April 26, 1895, one Frederick M. Barrows, who was a shareholder in the capital stock of said Natchaug Silk Company, filed in the superior court of the State of Connecticut his bill in chancery, praying for the appointment of a receiver of all the property, both real and personal, of said corporation, who should be authorized to take immediate possession thereof and manage and carry on the business for the benefit of the creditors and stockholders thereof, and for such other relief as might be deemed proper. And thereupon on said day said superior court, through John M. Thayer, a judge thereof, duly appointed one James E. Hayden, as receiver of all the property, estate and rights of said Natchaug Silk Company and directed him to enter into and take possession of all the property of said corporation, and to continue the business of said Natchaug Silk Company until the further order of the court. And shortly thereafter and, to wit: on the same day, said Hayden duly qualified and entered upon the discharge of his duties as such receiver and has ever since continued to act and is still acting as such receiver.

14. After the making of said bill of sale there was no change in the possession of the goods other than as above named, but they remained in the custody of the same persons who had theretofore been in charge of them for the silk company and they were apparently in the possession of the silk company so far as appeared to the public and were sold in the same way as theretofore down to the day of the attachment. There was no change in the title to or possession of said goods which was visible, open or notorious down to the date of the attachments, unless the facts hereinbefore and

hereinafter specifically stated did, as a matter of law, constitute a visible, open and notorious change of possession.

15. The Natchaug Silk Company was long prior to and during April, 1895, hopelessly insolvent and this fact was well known to Chaffee, its president.

16. When Chaffee started on his trip on April 22nd, he expected that a receiver would shortly be appointed for the corporation and he left directions with his subordinate, Barrows, looking to the possibility of the appointment of a receiver during his absence which extended over a period of about one week.

17. The giving of the supposed bill of sale to Dooley in Chicago, and the attempted transfer of the goods constituted an attempt by Chaffee in contemplation of the insolvency and liquidation of the company to give a preference to Dooley as against the other creditors of the company.

18. Chaffee was not vested with authority to make this transfer by the charter of the company nor by the by-laws, nor by any action of the board of directors, nor was his act ever ratified by the board of directors or by the company in any manner unless the facts hereinbefore and hereinafter stated as a matter of law constituted such ratification. He had never had authority vested in him at any time by the company to make this transfer or to make similar transfers unless the facts hereinbefore and hereinafter stated, as a matter of law, conferred upon him such authority. He had never made a transfer similar to this prior to starting on his trip beginning April 22, 1895, on which trip he purported to make the transfer in controversy.

19. The bank knew and Dooley knew that this act was an attempted preference on Chaffee's part in contemplation of the insolvency and liquidation of the company.

20. The directors of the silk company on being told by Lucas, who was Dooley's attorney, that it was essential that they should ratify Chaffee's act in making the supposed transfer, refused to do so and took no action whatever in regard thereto.

21. Chaffee had never during the business career of the company done any act in behalf of the company that would lead the bank or any one else to suppose that he had been given the power by the company to dispose of its assets by way of preference in case of impending dissolution.

22. The signs of the Natchaug Silk Company on the outside and inside of the store were not changed between April 24th and the time of the levy of the attachments.

23. There was nothing in the appearance of the store outside or inside to indicate that there had been any change in the title or possession to the goods on or after April 25th and until May 20th, the time of the attachment.

24. The same persons (being five or six in number) remained in the store performing, after the transfer to Dooley, apparently the same duties they had been performing prior to April 25th.

25. The salesmen were instructed not to inform the public nor customers of the transfer to Dooley and they did not do so, but all

the goods that were shipped from said store were billed to customers in the name of the plaintiff and not in the name of the silk company.

26. Orders kept coming in addressed to the Natchaug Silk Company after April 25th, for several weeks, in all respects as they had come in prior to that and these orders were appropriated and filled by Stanton out of the stock in the store.

27. The office fixtures were not attempted to be transferred
19 to Dooley but they were used in conducting the business after April 25th in all respects as before by Stanton in the sale of the goods.

28. Stanton's books of account and papers in relation to sales after April 25th, were all kept in a safe belonging to the Natchaug Silk Company and which had its name painted in large letters therein and which was standing in the store.

29. No advertisement was made of the transfer to Dooley nor was any public notice given thereof, unless as a matter of law the facts hereinbefore and hereinafter stated constituted such public notice.

30. There was nothing to inform the public that any change had taken place in the ownership or possession of the goods between April 24, 1895, and the levy of the attachment on May 20, 1895, unless as a matter of law the facts hereinbefore and hereinafter mentioned constituted sufficient information to the public of such change.

31. The change of ownership was not open or visible or notorious unless as a matter of law the facts hereinbefore and hereinafter stated constituted open or visible or notorious change of ownership.

32. After the appointment of said Hayden as receiver and on or about the 29th day of April, 1895, said Chaffee met in the office of said Natchaug Silk Company at Willimantic with all of the directors of said corporation who were then living and were within the State of Connecticut, being three in number besides himself, the entire board of directors consisting of six members of whom one, to wit: said Risley, was dead, and another was absent from the State. At said meeting said plaintiff and said Lucas were also present and said Chaffee reported to said directors present at said meeting the making of said bill of sale of said goods in Chicago to the plaintiff above mentioned and requested them to ratify the same, but said directors declined to take any action whatever in regard thereto and neither expressed an approval nor disapproval of the act of said Chaffee in making said bill of sale. On the same day said Chaffee informed said Hayden of the making of said bill of sale, but said Hayden took no action in regard thereto and neither he, said Hayden, nor the board of directors of said silk company, took any action whatever with respect to the making of said bill of sale down to the time of the levy of the writ of attachment hereinafter mentioned.

33. That in the early part of 1895, the silk company was indebted to the bank in a sum over $300,000. The company had

been long prior to that time hopelessly insolvent and this
20 fact was well known to Chaffee and to Risley who was the cashier of the bank and a director of said bank. About this time and for the purpose of obtaining credit for the company certain false and fraudulent statements as to the assets and liabilities of the silk company were made up by Risley and were sent to Hadden & Co. and to Morimura & Co., and to China & Japan Trading Co., all dealers in raw silk, for the purpose of deceiving them as to the condition of the silk company and causing them to furnish raw silk on credit to the silk company to be manufactured into goods. Said fraudulent statements indicated that the silk company was solvent. Said fraudulent statements represented that said company was about $200,000 better off than it really was. Risley well knew the amount of the indebtedness to the bank and knew that this large indebtedness rendered said company insolvent, but in said statements he falsely and fraudulently concealed such fact. Fowler was a director in the bank and a director of the silk company. Relying upon such statements said raw-silk dealers furnished raw silk to said company on credit which they would not have done unless they had been deceived by said fraudulent statements. The raw silk thus furnished was of the value of about $40,000 and was manufactured into silk goods which constituted a large part of the goods attempted to be transferred to Dooley. The entire amount of the claims of said attaching creditors was for raw silk furnished on the faith of these fraudulent statements early in 1895.

34. The damages that the plaintiff would have been entitled to recover had the issues been found by the court in his favor are shown by the evidence, but inasmuch as the issues are to be found for the defendant, the court declines to find the amount of such damages, said damages, however, exceed ten thousand dollars ($10,000).

35. That the by-laws of the silk company providing for the office of general manager, provided that such officer should be elected annually by the directors. No general manager had been elected for two years prior to April 25, 1895.

36. Said sheriff after levying the attachments hereinbefore mentioned retained possession of said goods until June 10, 1895, on which date, pursuant to an order of the superior court of Cook county, Illinois, in the said case of Harold F. Haddon, *et al.* *vs.* The Natchaug Silk Company, *et al.*, hereinbefore mentioned on the chancery side of said court, said sheriff turned over the possession of said goods to Henry L. Stanton who had by said court in said cause been appointed receiver of said goods on June 8, 1895, and
said Stanton thereafter as receiver sold said goods pursuant
21 to the orders of said court in the usual course of business, retaining for that purpose the same employés he had retained when he was selling said goods for Dooley, and selling said goods in the same manner as he had been selling them for said Dooley.

37. No deduction from or cancellation of the debt to the bank or

its receiver, Dooley, was made at the time of or by reason of the giving of said bill of sale, nor was any deduction from, or cancellation of said debt made by said Dooley in his proof of claim against the receiver of said silk company, filed April 7, 1896, on account of or by reason of the giving of this bill of sale, although he had received the sum of $7,000 out of the sale of a portion of these goods.

Upon the foregoing facts the court finds the issues for the defendant, and finds the defendant not guilty of the trespasses in said declaration charged against him.

P. S. GROSSCUP, *Judge.*

(Endorsed:) Filed May 28, 1897. S. W. Burnham, clerk.

On the same day, to wit: the twenty-eighth day of May, 1897, in the December term of said court, 1896, in the record of proceedings thereof in said entitled cause, before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

Judgment, May 28, 1897.

MICHAEL F. DOOLEY, as Receiver of the First National Bank of Willimantic, Connecticut,
vs.
JAMES PEASE, Sheriff.
} 23796. Case.

It having been stipulated in writing by and between the parties to this suit that a jury should be waived and the cause submitted to the court without a jury, and the cause now coming on for trial and the court having heard the evidence and the arguments of counsel and being fully advised in the premises, doth from the evidence find the defendant, James Pease, not guilty of the trespasses or any or either of them laid to his charge in the declaration of the plaintiff, Michael F. Dooley, and thereupon it is now hereby
22 considered, ordered and adjudged by the court that the said defendant be discharged and that he go hence without day, and that he have and recover of and from the said plaintiff his costs in this behalf expended and that execution issue therefor.

Afterwards, to wit: on the seventeenth day of November, 1897, came Michael F. Dooley, receiver, &c., and filed in the clerk's office of said court his petition for writ of error, which said petition is in the words and figures following, to wit:

Petition for Writ of Error. Filed Nov. 17, 1897.

Petition for writ of error.

Circuit Court of the United States, Northern District of Illinois, Northern Division.

MICHAEL F. DOOLEY, Receiver of the First National Bank of Willimantic, Connecticut, *vs.* JAMES PEASE.	Trespass.

And now comes Michael F. Dooley, receiver of the First National Bank of Willimantic, Connecticut, the plaintiff in the above-entitled cause, and prays that a writ of error may be allowed and issued to said circuit court of the United States in and for the northern division of the northern district of Illinois, in the above-entitled cause to bring before the circuit court of appeals for the seventh circuit the final judgment and proceedings of said circuit court in the above-entitled cause.

HIRAM T. GILBERT,
Att'y for Plaintiff.

(Endorsed:) Filed Nov. 17, 1897. S. W. Burnham, clerk.

23 On the same day, to wit: the seventeenth day of November, 1897, came Michael F. Dooley, receiver, by his attorney and filed in the clerk's office of said court his assignment of error, which said assignment of error is in the words and figures following, to wit:

Assignment of Error. Filed Nov. 17, 1897.

Assignment of error.

Circuit Court of Appeals, Seventh Circuit.

MICHAEL F. DOOLEY, Receiver of the First National Bank of Willimantic, Connecticut, Plaintiff in Error, *vs.* JAMES PEASE, Defendant in Error.	Error to Circuit Court, Northern District of Illinois, Northern Division.

And now comes the above-named plaintiff in error, by his attorney, and respectfully shows to the court that in the record and proceedings of said circuit court in the above-entitled cause and in the rendition of the final judgment therein manifest error hath intervened to the injury of said plaintiff in error in this, to wit:

First. That said circuit court erred in finding the issues joined in favor of the defendant.

Second. That said circuit court erred in entering judgment in favor of the defendant upon findings of fact by said court.

Third. That said circuit court erred in not entering judgment in favor of the plaintiff upon the findings of fact made by said court in said cause.

Wherefore for these and other errors apparent in the record the said Michael F. Dooley, as receiver of the First National Bank of Willimantic, Connecticut, prays that the said judgment of said circuit court may be reversed and said cause remanded to said circuit court with directions to enter a judgment therein in favor of the plaintiff.

HIRAM T. GILBERT,
Attorney for Plaintiff in Error.

(Endorsed:) Filed Nov. 17, 1897. S. W. Burnham, clerk.

24 On the same day, to wit: the seventeenth day of November, in the July term of said court, 1897, in the record of proceedings thereof in said entitled cause before the Hon. Peter S. Grosscup, district judge, appears the following entry, to wit:

Order of November 17, 1897.

MICHAEL F. DOOLEY, Receiver of the First National Bank of Willimantic, Connecticut, *vs.* JAMES PEASE.	Trespass.

This day comes the plaintiff, by Hiram T. Gilbert, his attorney, and files herein and presents to the court the petition of the plaintiff for the allowance of a writ of error herein, and on consideration whereof the court does allow the writ of error prayed for upon the said plaintiff giving a bond according to law in the sum of five hundred dollars ($500) and does order that a citation be issued herein returnable according to law.

On the same day, to wit: the seventeenth day of November, 1897, came Michael F. Dooley as receiver of the First National Bank of Willimantic as principal, and Hiram T. Gilbert, as surety, and filed in the clerk's office of said court an appeal bond, which said bond is in the words and figures following, to wit:

Appeal Bond. Filed Nov. 17, 1897.

Appeal bond.

Know all men by these presents, that we, Michael F. Dooley, as receiver of the First National Bank of Willimantic, as principal, and Hiram T. Gilbert, as surety, are held and firmly bound unto James Pease in the penal sum of five hundred ($500) dollars, for the payment of which well and truly to be made, we bind ourselves, our successors, heirs, administrators and assigns, jointly and severally, firmly by these presents.

Witness our hands and seals this 17th day of November, A. D. 1897.

The condition of the above obligation is such, that whereas on or about the 28th day of May, A. D. 1897, the circuit court of the United States, in and for the northern division of the northern district of Illinois, in a certain cause then therein pending, wherein said Michael F. Dooley, as receiver as aforesaid, was plaintiff and said James Pease was defendant, did enter a judgment in favor of the said Pease and against the said Michael F. Dooley, as receiver, as aforesaid, and the said Michael F. Dooley, as receiver, as aforesaid, has sued out and obtained a writ of error to the said circuit court of the United States to reverse the said judgment:

Now, therefore, the condition of this obligation is such that if the said Michael F. Dooley, as receiver as aforesaid, shall prosecute said writ of error to effect and answer all costs which may be awarded against him, if he fail to make good his plea, then the above obligation to be void, otherwise to remain in full force and effect.

MICHAEL F. DOOLEY,
Receiver of the First National Bank of Willimantic. [SEAL.]
HIRAM T. GILBERT. [SEAL.]

Approved:
P. S. GROSSCUP.

(Endorsed:) Filed Nov. 17, 1897. S. W. Burnham, clerk.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Michael F. Dooley, receiver of the First National Bank of Willimantic, Connecticut, plaintiff, and James Pease, a manifest error hath happened, to the great damage of the said Michael F. Dooley, receiver of the First National Bank of Willimantic, Connecticut, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the seventh circuit, together with this writ, so that you have the same in the said circuit court of
26 appeals at Chicago within thirty days from the date hereof, that the record and proceedings aforesaid, being inspected, the said circuit court of appeals may cause further to be done

therein to correct that error, what of right, and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice
[SEAL.] of the United States, the 17th day of November, in the year of our Lord one thousand eight hundred and ninety-seven.

S. W. BURNHAM,
Clerk of the Circuit Court of the United States
for the Northern Dist. of Illinois.

Clerk's Certificate.

NORTHERN DISTRICT OF ILLINOIS, } ss:
Northern Division, }

I, S. W. Burnham, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript (with the exception of the depositions of Darwin R. Aldridge, Harold F. Hadden, Richard V. Briesen, Henry B. Twombley, Howard Ayers, J. Dwight Chaffee, Charles Fenton, Frederick M. Barrows, Michael F. Dooley, James E. Hayden, Frank M. Wilson, H. J. Turner and certain schedules, which are omitted from the record) of all the proceedings had in said court in the cause wherein Michael F. Dooley, as receiver of the First National Bank of Willimantic, Connecticut, is the plaintiff, and James Pease, sheriff, is the defendant, as the same appear from the original records and files of said court now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at my office in Chicago, in said district, this fourteenth day of December, 1897.

S. W. BURNHAM, *Clerk.*

27 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to James Pease, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals, for the seventh circuit, to be holden at Chicago, Illinois, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, northern division, wherein Michael F. Dooley, as receiver of the First National Bank of Willimantic, Connecticut, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Peter S. Grosscup, judge of the district court of the United States, this 17th day of November, in the year of our Lord one thousand eight hundred and ninety-seven.

P. S. GROSSCUP, *Judge, &c.*

No. 23796. United States circuit court, northern district of Illinois, northern division. Michael F. Dooley, receiver of the First National Bank of Willimantic, *vs.* James Pease. Citation. Returnable ——, 189–. —— ——, clerk. Filed Nov. 19, 1897. S. W. Burnham, clerk.

Service of the within citation acknowledged this 17th day of November, 1897.

A. W. GREEN,
H. S. ROBBINS,
LOCKWOOD HONORE,
Attorneys for Defendant.

28 At a regular term of the United States circuit court of appeals for the seventh circuit, begun and held at the United States court-rooms, in the city of Chicago, in said seventh circuit, on Monday, the fourth day of October, 1897, of the October term, in the year of our Lord one thousand eight hundred and ninety-seven, and of our Independence the one hundred and twenty-second.

And afterwards, to wit, on the sixteenth day of December, 1897, in the October term aforesaid, came the plaintiff in error, by his counsel, Mr. Hiram T. Gilbert, and filed his appearance in the office of the clerk of this court; which appearance is in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1897.

MICHAEL F. DOOLEY, Receiver, etc., *vs.* JAMES PEASE. } No. 472.

The clerk will enter my appearance as counsel for the plaintiff in error.

HIRAM T. GILBERT.

Endorsed: Filed Dec. 16, 1897. Oliver T. Morton, clerk.

29 And afterwards, on the same day, to wit, on the sixteenth day of December, 1897, in the October term aforesaid, came the defendant in error, by his counsel, Mr. A. W. Green, and filed his appearance in the office of the clerk of this court; which appearance is in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1897.

MICHAEL F. DOOLEY, Receiver, etc.,
vs.
JAMES PEASE. } No. 472.

The clerk will enter my appearance as counsel for the defendant in error.

A. W. GREEN,
205 *La Salle St.*

Endorsed: Filed Dec. 16, 1897. Oliver T. Morton, clerk.

And afterwards, to wit, on the twelfth day of April, 1898, in the October term aforesaid, the following proceedings were had in said entitled cause and entered of record, to wit:

TUESDAY, *April* 12, 1898.

Before Hon. William A. Woods, circuit judge; Hon. John W. Showalter, circuit judge.

MICHAEL F. DOOLEY, Receiver, etc.,
vs.
JAMES PEASE. } 472.

30 In error to the circuit court of the United States for the northern district of Illinois, northern division.

Upon application of counsel for defendant in error, it is ordered by the court that the time allowed by the rules in which defendant in error may file his brief in this cause be, and the same is hereby, enlarged ten days.

And afterwards, to wit, on the second day of May, 1898, in the October term aforesaid, the following further proceedings were had and entered of record, to wit:

MONDAY, *May* 2, 1898.

Present: Hon. William A. Woods, circuit judge; Hon. John W. Showalter, circuit judge; Hon. Romanzo Bunn, district judge.

Order.

It is ordered by the court that Romanzo Bunn, judge of the district court of the United States for the western district of Wisconsin, be designated and assigned to sit in this court as a member thereof during the present session. Thereupon said Bunn appeared and took his seat as a member of said court.

And afterwards, on the same day, to wit, on the second day of May, 1898, in the October term aforesaid, the following further proceedings were had and entered of record, to wit:

31 MONDAY, *May* 2, 1898.

Before Hon. William A. Woods, circuit judge; Hon. John W. Showalter, circuit judge; Hon. Romanzo Bunn, district judge.

MICHAEL F. DOOLEY, Receiver, etc.,
vs.
JAMES PEASE. } 472.

In error to the circuit court of the United States for the northern district of Illinois, northern division.

It is ordered by the court that this cause be, and the same is hereby, set down for hearing May 10, 1898.

And afterwards, to wit, on the tenth day of May, 1898, in the October term aforesaid, the following further proceedings were had and entered of record, to wit:

TUESDAY, *May* 10, 1898.

Before Hon. William A. Woods, circuit judge; Hon. John W. Showalter, circuit judge; Hon. Romanzo Bunn, district judge.

MICHAEL F. DOOLEY, Receiver, etc.,
vs.
JAMES PEASE. } 472.

32 In error to the circuit court of the United States for the northern district of Illinois, northern division.

Now this day come the parties, by their counsel, and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. Lockwood Honore, counsel for defendant in error, and the court not now being sufficiently advised takes this matter under consideration.

And afterwards, to wit, on the twenty-sixth day of July, 1898, there was filed in the office of the clerk of this court the opinion of the court; which opinion is in the words and figures following, to wit:

33 In the United States Circuit Court of Appeals for the Seventh Circuit, May Session, A. D. 1898.

MICHAEL F. DOOLEY, as Receiver of the First National Bank of Willimantic, Connecticut,
vs.
JAMES PEASE. } No. 472. In Error to the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

Before Woods and Showalter, circuit judges, and Bunn, district judge.

WOODS, circuit judge, delivered the opinion of the court:

This was an action of trespass by the plaintiff in error, Michael F. Dooley, as receiver of the First National Bank of Willimantic,

Connecticut, against the defendant in error, James Pease, charging him with having forcibly seized and carried away a stock of goods in store at numbers 213 and 215 Fifth avenue, in the city of Chicago. The defendant pleaded the general issue, under which it was agreed that all defenses of whatever nature might be proved as if specially pleaded, and by stipulation in writing a jury was waived and
34 the court made a special finding of facts, upon which it pronounced the defendant not guilty, and gave judgment accordingly. Error is assigned to the effect that the judgment is not supported by the facts found.

The special finding is made of great length by the statement of many facts which, though relevant and important, are evidentiary only of the ultimate facts found. For the present purpose a short statement will be sufficient. At the time of the alleged trespass, May 20, 1895, the defendant, Pease, was the sheriff of Cook county, Illinois. He seized the goods by virtue of a writ of attachment, for the sum of $14,786.53, issued out of the circuit court of Cook county, against the Natchaug Silk Company, a corporation of Connecticut, and four days later he levied on the goods another attachment out of the same court against the same company for a sum exceeding $8,000.00. The validity of the writs under which the seizure was made is not questioned. The dispute is over the ownership of the goods at the time of the seizure. They had belonged to the attachment defendant, The Natchaug Silk Company, prior to and on April 25, 1895, and the point of dispute is whether the instrument of sale that day executed in the name of the company by its president was valid and effective to transfer title to the plaintiff in error as receiver of the First National Bank of Willimantic, Connecticut. The validity of that instrument is denied on several grounds. The first is that the president of the company was without authority to make the sale. Upon this point the court found, as a fact, and also as a matter of legal conclusion, that the president of the company had no authority to make the sale, and seems to have placed its decision of the case mainly upon that ground. It is insisted that certain facts specifically stated in the finding require the contrary conclusion. The facts chiefly relied on are, that the president of the company had also been made its general manager; that as president he was empowered by a by-law of the corporation to "perform all duties especially required of him by the statute laws of this State (Connecticut) but his charge of the executive business of the company shall be subject to the control of the directors;" and that by an amendment of the by-laws a general manager was to be chosen annually who should "have entire charge of the business and affairs of the said company, subject to the order and approval of the board of directors." On the authority of Hadden *v.* Dooley, 38 U. S. App., 651; 20 C. C. A., 494; Scudder *v.* Anderson, 54 Mich., 122, and especially of Lewis *v.* Hartford Silk Mfg. Co., 56 Conn., 25, it is insisted that the power of general management so given to the president of the company included the power to pay the debts of the company by the application of any portion or all of its personal property.
35 Manifestly, however, such a question is not one of law purely, but also of fact, dependent upon the circumstances of each

case. The cases mentioned, it is to be assumed, were decided correctly upon the proofs adduced. In this case the court found the fact to be that the sale was unauthorized and had never been ratified by the company; and there are many circumstances and evidentiary facts set forth in the special finding which tend to support the conclusion, the chief being that the debtor company was at the time absolutely insolvent and on the verge of suspending business, and that, without the sanction of any other officer or member of the company, the president, knowing the situation, made this sale and others, covering the entire property of the company, to particular creditors for the purpose of preferring them over other creditors. Whether the finding of the court upon this question was according to the preponderance of the evidence is a question which this court cannot consider. Besides the provision in section 1011 of the Revised Statutes that "there shall be no reversal * * * upon a writ of error * * * for any error of fact," it is well settled that under sections 649 and 700 the right of review, when judgment has been rendered upon a special finding, extends only to "the rulings of the court in the progress of the trial," and to "the determination of the sufficiency of the facts proved to support the judgment." The cases on the subject in the Supreme Court and in the circuit courts of appeals are numerous. See Fourth National Bank *v.* City of Belleville, 53 U. S. App., 28; 27 C. C. A., 674; Sunley *v.* Barker, 55 U. S. App., 125; Stanley *v.* Supervisors, 121 U. S., 535; Hathaway *v.* Cambridge Nat. Bank, 134 U. S., 491; St. Louis *v.* Rutz, 138 U. S., 226. In Runkle *v.* Burnham, 153 U. S., 216, it is said that "findings of fact made by the court below are binding here if there be any evidence to support them."

It necessarily follows, and has often been decided, that a mixed question of law and fact cannot be reviewed on a writ of error. Dennistown *v.* Stewart, 18 How., 565; Jewell *v.* Knight, 123 U. S., 426; Smith *v.* Craft, 153 U. S., 436; Burnham *v.* North Chicago Street R'y Co., 46 U. S. App., 670; 23 C. C. A., 677. When the trial is by jury the law part of such mixed questions may be saved for review on exceptions to the rulings of the court (Norris *v.* Jackson, 9 Wall., 125), but if a party sees fit to waive a jury in a case involving a question of that kind, he puts it beyond his power to challenge the court's finding, unless he may chance to be able to do so upon an exception to a ruling during the progress of the trial. For instance, if the issue be negligence, which rarely is resolved into
a pure question of law, a special finding of the ultimate fact
36 either way cannot be overthrown by force of merely evidentiary facts stated in the finding, however strong; and so, here, the finding that the sale was unauthorized and was not ratified cannot be impeached on the strength of the circumstances stated tending to show the contrary.

The sale, made as it was without authority, did not pass title, and the goods were therefore subject to seizure by virtue of the writs of attachment.

Another ground on which the sale was clearly invalid is the finding of the court that the sale was not followed by an open or visible

or notorious change of possession or ownership, unless, as matter of law, the facts stated in the finding constituted sufficient information to the public of the change. The facts so stated were evidentiary only, and, instead of being conclusive of publicity, tended rather to show intentional concealment. They were certainly sufficient, even if we were required to look into the evidence, to support the finding of the ultimate fact. The sale was therefore void under the law of Illinois, which "will not permit the owner of personal property to sell it and still continue in the possession of it." Green *v.* Van Buskirk, 7 Wall., 139; Henry *v.* Locomotive Works, 93 U. S., 664; Martin *v.* Duncan, 156 Ill., 274; Harkness *v.* Russell, 118 U. S., 663; Pullman Car Co. *v.* Pennsylvania, 141 U. S., 18.

It is urged that while the Federal courts follow the rule of the State that a transfer of personal property, where the vender is permitted to remain in possession, is fraudulent and void as to creditors, the Federal courts are not bound to give heed to the opinions of the supreme court of Illinois upon matters of fact, and that what will constitute a sufficient change of possession must necessarily be determined upon the facts of each case. That may be conceded; but the court here having determined the fact against the appellant, whether according to the weight of the evidence or not, the finding, by the authorities already cited, cannot be reviewed.

There are other propositions embraced in the finding which, it is urged, are sufficient to support the judgment rendered, but they need not be considered.

The judgment is affirmed.

37 And afterwards, on the same day, to wit, on the twenty-sixth day of July, 1898, in the October term aforesaid, the following further proceedings were had and entered of record, to wit:

TUESDAY, *July* 26, 1898.

Present: Hon. William A. Woods, circuit judge; Hon. John W. Showalter, circuit judge.

Before Hon. William A. Woods, circuit judge; Hon. John W. Showalter, circuit judge; Hon. Romanzo Bunn, district judge.

MICHAEL F. DOOLEY
vs. } 472.
JAMES PEASE.

In error to the circuit court of the United States for the northern district of Illinois, northern division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of Illinois, northern division, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

38 At a regular term of the United States circuit court of appeals for the seventh circuit begun and held at the United States court rooms, in the city of Chicago, in said seventh circuit, on Monday, October third, 1898, in the October term, in the year of our Lord one thousand eight hundred and ninety-eight, and of our Independence the one hundred and twenty-third.

And afterwards, to wit, on the twenty-sixth day of May, 1898, in the October term last aforesaid, there was filed in the office of the clerk of this court a writ of error in said entitled cause; which writ of error is in the words and figures following, to wit:

39 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the seventh circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the United States circuit court of appeals, before you or some of you, between Michael P. Dooley, as receiver of the First National Bank of Willimantic, Connecticut, plaintiff in error, and James Pease, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Seal of the Supreme Court of the United States.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

40 Allowed, and the writ being applied for by direction of the Comptroller of the Currency of the United States, to operate as a supersedeas without bond.

Dated May 15, 1899.

HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

41 UNITED STATES OF AMERICA, }
Seventh Judicial Circuit. }

In obedience to the within writ I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the United States circuit court of appeals for the seventh circuit, in the foregoing-entitled cause, this fifth day of April, 1899.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

42 [Endorsed:] U. S. circuit court of appeals, 7th circuit. Michael F. Dooley, as rec'r, etc., plaintiff in error, against James Pease, defendant. Writ of error. Copy of the within writ on file in clerk's office. Filed May 26, 1899. Edward M. Holloway, clerk.

43 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 40, inclusive, contain a true copy of the transcript of the record and proceedings in the United States circuit court of appeals for the seventh circuit in the case of Michael F. Dooley, receiver of the First National Bank of Willimantic, Connecticut, *vs.* James Pease, No. 472, October term, 1899, as the same remains upon the files and records of the United States circuit court of appeals for the seventh circuit.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this fifth day of July, A. D. 1899.

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

44 UNITED STATES OF AMERICA, *ss:*

To James Pease, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the seventh circuit, wherein Michael F. Dooley, as receiver of the First National Bank of Willimantic, Connecticut, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the

judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this 15th day of May, 1899.

HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

Service of the above citation accepted this 26th day of May, A. D. 1899.

GREEN, HONORÉ & PETERS,
Attorneys for James Pease, Defendant in Error.

45 [Endorsed:] Michael F. Dooley, as rec'r, plaintiff in error, against James Pease, defendant. Citation. Filed May 26, 1899. Edward M. Holloway, clerk.

Endorsed on cover: File No. 17,462. U. S. C. C. of appeals, 7th circuit. Term No., 348. Michael F. Dooley, as receiver of the 1st National Bank of Willimantic, Connecticut, plaintiff in error, *vs.* James Pease. Filed July 14, 1899.

No. 97.

Office Supreme Court, U.S.
FILED
NOV 9 1900
JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

Ety. of Pease v. P. C.

OCTOBER TERM, 1900.

Number 97.

Filed Nov. 9, 1900.

MICHAEL F. DOOLEY, AS RECEIVER OF THE FIRST NATIONAL BANK OF WILLIMANTIC, CONNECTICUT, PLAINTIFF IN ERROR,

vs.

JAMES PEASE.

Brief for the Plaintiff in Error.

ABSTRACT OR STATEMENT OF THE CASE.

FIRST HEAD: Nature of the Action.

Error to the Court of Appeals for the Seventh Circuit, bringing up a judgment of that court which affirmed a judgment of the Circuit Court in favor of the defendant below. The action was trespass by the receiver of the First National Bank of Willimantic, Connecticut, against the sheriff of Cook County, Illinois, to recover for the taking by the latter of certain silk under attachments sued out by certain creditors of the Natchaug Silk Company, a Connecticut manufacturing corporation.

The plaintiff in error claimed to own the silk by virtue of a transfer of it made by him by one Chaffee, the president and general manager of the Natchaug Company.

A jury trial was waived by stipulation, and the trial court—Judge Grosscup—made a general finding of not guilty, and a large number of special findings of facts.

The Circuit Court of Appeals affirmed the judgment entered upon the finding of not guilty—holding:

1. That Chaffee's attempted transfer of the silk was not good, because not authorized by the directors.

2. That the transfer was void under the law of Illinois, which "will not permit the owner of personal property to "sell it and still continue in possession of it."

SECOND HEAD: Findings as to the Transfer.

4. The goods in controversy in this case belonged, prior to April 25, 1895, to the Natchaug Silk Company, a Connecticut corporation.

6. The Natchaug Silk Company was originally organized on the 25th day of October, 1887, under the provisions of the laws of the State of Connecticut, then in force, authorizing and regulating the formation of stock corporations, and subsequently on the 12th day of June, 1889, a special act of the assembly of the State of Connecticut was passed in and by which it was declared that said Natchaug Silk Company should have and enjoy its corporate franchise and all the rights and privileges in said act granted for the purpose of manufacturing and dealing in all kinds of silk, cotton, mohair, wool and all articles composed wholly or in part of silk, cotton, leather, wool or other substance and to do such other things as were incident to the prosecution of said business and to exercise such mercantile powers as might be convenient and necessary for the successful prosecution of said business. Said act further provided that the stock, property and affairs of said corporation should be managed by its directors, a majority of whom, when convened in accordance with the by-laws, should constitute a board for the transaction of business, and that the president and directors should have power to appoint or employ from time to time a secretary, treasurer and such other officers, agents, mechanics and laborers as they might deem necessary and proper. The act further provided that the then existing by-laws of said corporation should continue in force until the same should be altered or repealed by a vote of the stockholders, and that said stockholders should have power to alter or repeal said by-laws and to make or establish such other by-laws, rules

and regulations not inconsistent with the laws of said State or of the United States as they might deem expedient for the management of the affairs of said corporation.

The third by-law adopted by the corporation on the 29th day of October, 1887, is as follows:

"The president shall preside at all meetings of the stockholders of said company when present, and in his absence the meeting shall be called to order by the secretary and a president *pro tem.* be appointed. He shall also perform all duties especially required of him by the statute laws of this State, but his charge of the executive business of the company shall be subject to the control of the directors."

At the annual stockholders' meeting on the 3rd day of February, 1891, the following amendment to the by-laws was adopted:

"The board of directors shall annnally elect a general manager, who shall have entire charge of the business and affairs of said company, subject to the order and approval of the board of directors."

The foregoing by-laws continued in force down to the time of the suspension by the corporation of its business and the appointment of its receiver.

Said two by-laws and said provisions above stated in the said act of the assembly of Connecticut are the only provisions of the charter of said corporation or of its by-laws necessary to be considered in determining the powers of its president or general manager.

7. On said 25th day of April, 1895, J. D. Chaffee was the president and acting general manager of said corporation and had been such president and acting general manager for more than two years prior thereto. Said Chaffee as such president and acting general manager had had entire charge of the current business and affairs of said corporation as a going concern and within the field of its ac-

tivities as a going concern and had been permitted by its board of directors to manage as he saw fit the said current business and affairs of said corporation as a going concern, as aforesaid, except that until about the 15th day of April, 1895, one O. H. K. Risley, a member of the board of directors of said corporation who was likewise cashier of said First National Bank of Willimantic had had charge of the financial affairs of said corporation and the borrowing of money for said corporation, on which last-mentioned date said Risley died at Willimantic, in the State of Connecticut, which was the principal place of business of said corporation, and except that said Chaffee during the time he was president and general manager at various times consulted the directors in regard to hiring an extra office outside the mill and in regard to *hiring an extra office outside the mill and in regard to* insuring the accounts of the company in a liability insurance company and in regard to purchasing or mortgaging of real estate and in regard to the policy to be pursued when strikes arose among the employés in regard to reducing wages.

8. The said First National Bank of Willimantic had, as a national banking association aforesaid, been engaged for many years in the business of banking under the laws of the United States at Willimantic aforesaid, and continued to carry on said banking business until said 23rd day of April, 1895, on which date, it having become insolvent, said plaintiff was appointed as its receiver as aforesaid. At the time of such appointment of the plaintiff said Natchaug Silk Company was indebted to said First National Bank of Willimantic to an amount exceeding $200,000 for moneys theretofore loaned by said First National Bank of Willimantic to said Natchaug Silk Company to enable said Natchaug Silk Company to carry on its said business, no part of which said indebtedness has ever been paid.

9. Prior to or about the time of his appointment as such receiver the plaintiff requested of said Chaffee, as president and general manager of said Natchaug Silk Company, that said Natchaug Silk Company should give security for the payment of its indebtedness to said First National Bank of Willimantic, and said plaintiff then and there told said Chaffee that unless said security was given he, the plaintiff, would close said silk company up.

10. Immediately thereafter said Chaffee came to the city of Chicago, together with one Solomon Lucas, an attorney-at-law who had been employed by the plaintiff to look after the interests of said First National Bank of Willimantic, and executed in the name of said Natchaug Silk Company and delivered to said Lucas on behalf of the plaintiff a bill of sale of the goods and chattels described in the plaintiff's declaration, together with certain other goods and chattels which at the time of the execution of said bill of sale were owned by said Natchaug Silk Company, being the stock of goods owned by said Natchaug Silk Company and then in the store known as numbers 213 and 215 Fifth avenue in the city of Chicago, Illinois, which said bill of sale was and is in the words and figures following, to wit:

"Know all men by these presents, that the Natchaug Silk Company, of the town of Windham, in the county of Windham and State af Connecticut—party of the first part, for and in consideration of the sum of twenty thousand dollars, lawful money of the United States of America, to it in hand paid at or before the ensealing and delivery of these presents, and divers other good and valuable considerations received of Michael F. Dooley, as receiver of the First National Bank of Willimantic of Connecticut of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and delivered, and, by these presents, do grant, bargain, sell and deliver unto

the said party of the second part, all the following goods, chattels and property, to wit:

"The stock of goods owned by the said Natchaug Silk Company and now in the store known as Nos. 213 and 215 Fifth avenue in the city of Chicago, in the State of Illinois, said stock of goods are silk goods and consists of dress goods, lining, braids, fish-lines, sewing silk and buttons.

"To have and to hold the said goods, chattels and property unto the said party of the second part, his heirs, executors, administrators, successors and assigns, to and for his own proper use and behoof, forever.

"And the said party of the first part do vouch itself to be the true and lawful owner of the said goods, chattels, and property and had in itself full power, good right, and lawful authority to dispose of the said goods, chattels and property, in manner, as aforesaid: And it does for itself and its successors, covenant and agree to and with the said party of the second part, to warrant and defend the said goods, chattels and property to the said party of the second part, his successors in office, and assigns, against the lawful claims and demands of all and every person and persons whomsoever.

"In witness whereof, it has hereunto set its hand and seal the twenty-fifth day of April, in the year one thousand eight hundred and ninety-five by J. Dwight Chaffee, its president duly authorized in its name and behalf to execute and deliver this instrument at the city of Chicago, State of Illinois.

THE NATCHAUG SILK CO., [SEAL.]
By J. D. CHAFFEE, Pres't.

Sealed and delivered in the presence of—
H. L. STANTON."

At the time of the execution of said document said silk company was indebted to said attaching creditors in the amounts above specified.

15. The Natchaug Silk Company was long prior to and during April, 1895, hopelessly insolvent and this fact was well known to Chaffee, its president.

18. Chaffee was not vested with authority to make this transfer by the charter of the company nor by the by-laws, nor by any action of the board of directors, nor was his act ever ratified by the board of directors or by the company in any manner unless the facts hereinbefore and hereinafter stated as a matter of law constituted such ratification. He had never had authority vested in him at any time by the company to make this transfer or to make similar transfers unless the facts hereinbefore and hereinafter stated, as a matter of law, conferred upon him such authority. He had never made a transfer similar to this prior to starting on his trip beginning April 22, 1895, on which trip he purported to make the transfer in controversy.

20. The directors of the silk company on being told by Lucas, who was Dooley's attorney, that it was essential that they should ratify Chaffee's act in making the supposed transfer, refused to do so and took no action whatever in regard thereto.

21. Chaffee had never during the business career of the company done any act in behalf of the company that would lead the bank or any one else to suppose that he had been given the power by the company to dispose of its assets by way of preference in case of impending dissolution.

32. After the appointment of said Hayden as receiver and on or about the 29th day of April, 1895, said Chaffee met in the office of said Natchaug Silk Company at Willimantic with all of the directors of said corporation who

were then living and were within the State of Connecticut, being three in number besides himself, the entire board of directors consisting of six members of whom one, to wit: said Risley, was dead, and another was absent from the State. At said meeting said plaintiff and said Lucas were also present and said Chaffee reported to said directors present at said meeting the making of said bill of sale of said goods in Chicago to the plaintiff above mentioned, and requested them to ratify the same, but said directors declined to take any action whatever in regard thereto, and neither expressed an approval nor disapproval of the act of said Chaffee in making said bill of sale. On the same day said Chaffee informed said Hayden of the making of said bill of sale, but said Hayden took no action in regard thereto, and neither he, said Hayden, nor the board of directors of said silk company took any action whatever with respect to the making of said bill of sale down to the time of the levy of the writ of attachment hereinafter mentioned.

THIRD HEAD: Findings as to the Possession.

11. Said store had for several years prior thereto been operated by said Natchaug Silk Company as a store for the sale to dealers of its manufactured goods through one H. L. Stanton, who down to said April 25, 1895, had acted as its agent for that purpose, and at the time said bill of sale was executed and delivered by said Chaffee to said Lucas said Chaffee directed said Lucas to have the said goods that were included in said bill of sale sold and the proceeds of such sale applied by said plaintiff as a payment upon the indebtedness of said Natchaug Silk Company to said First National Bank of Willimantic.

12. On the morning of April 26, 1895, an attorney employed by said plaintiff, called at the store, purported to take possession of said goods in the name of the plaintiff, employed said H. L. Stanton as agent of the plaintiff to sell said goods and remit the proceeds of such sales to the plaintiff, and took from said Stanton a receipt stating that he, said Stanton, had received said stock of goods from the plaintiff and was to hold the said stock as custodian and agent for the plaintiff and subject to the plaintiff's directions. Immediately thereafter said Stanton caused the said stock of goods to be insured in the name of the plaintiff, and opened a new set of books for the purpose of keeping an account of the sale and disposition of said goods and of the expenses of said Stanton in and about the making of such sale, and also made an inventory of the said goods and delivered the same to the said attorney for the plaintiff. From that date said Stanton understood himself to be acting solely as the agent of the plaintiff. A portion of the said stock of goods was sold by said Stanton to various persons to whom the said goods were billed in the name of the plaintiff and the proceeds of said sales amounting to about $7,000, were received by said Stanton and placed to the credit of the plaintiff. No change was made from April 25, 1895, until after May 20, 1895, in the sign on the outside of said store, which signs were "Natchaug Silk Company."

14. After the making of said bill of sale there was no change in the possession of the goods other than as above named, but they remained in the custody of the same persons who had theretofore been in charge of them for the silk company and they were apparently in the possession of the silk company so far as appeared to the public and were sold in the same way as theretofore down to the day of the attachment. There was no change in the title to or possession of said goods which was visible, open or notori-

ous down to the date of the attachments, unless the facts hereinbefore and hereinafter specifically stated did, as a matter of law, constitute a visible, open and notorious change of possession.

22. The signs of the Natchaug Silk Company on the outside and inside of the store were not changed between April 24th and the time of the levy of the attachments.

23. There was nothing in the appearance of the store outside or inside to indicate that there had been any change in the title or possession to the goods on or after April 25th and until May 20th, the time of the attachment.

24. The same persons (being five or six in number) remained in the store performing, after the transfer to Dooley, apparently the same duties they had been performing prior to April 25th.

25. The salesmen were instructed not to inform the public nor customers of the transfer to Dooley and they did not do so, but all the goods that were shipped from said store were billed to customers in the name of the plaintiff and not in the name of the silk company.

26. Orders kept coming in addressed to the Natchaug Silk Company after April 25th, for several weeks, in all respects as they had come in prior to that and these orders were appropriated and filled by Stanton out of the stock in the store.

27. The office fixtures were not attempted to be transferred to Dooley but they were used in conducting the business after April 25th in all respects as before by Stanton in the sale of the goods.

28. Stanton's books of account and papers in relation to sales after April 25th, were all kept in a safe belonging to the Natchaug Silk Company and which had its name painted in large letters therein and which was standing in the store.

29. No advertisement was made of the transfer to Dooley

nor was any public notice given thereof, unless as a matter of law the facts hereinbefore and hereinafter stated constituted such public notice.

30. There was nothing to inform the public that any change had taken place in the ownership or possession of the goods between April 24, 1895, and the levy of the attachment on May 20, 1895, unless as a matter of law the facts hereinbefore and hereinafter mentioned constituted sufficient information to the public of such change.

31. The change of ownership was not open or visible or notorious unless as a matter of law the facts hereinbefore and hereinafter stated constituted open or visible or notorious change of ownership.

36. Said sheriff after levying the attachments hereinbefore mentioned retained possession of said goods until June 10, 1895, on which date, pursuant to an order of the superior court of Cook County, Illinois, in the said case of Harold F. Haddon, *et al.*, *vs.* The Natchaug Silk Company, *et al.*, hereinbefore mentioned on the chancery side of said court, said sheriff turned over the possession of said goods to Henry L. Stanton who had by said court in said cause been appointed receiver of said goods on June 8, 1895, and said Stanton thereafter as receiver sold said goods pursuant to the orders of said court in the usual course of business, retaining for that purpose the same employés he had retained when he was selling said goods for Dooley, and selling said goods in the same manner as he had been selling them for said Dooley.

BRIEF OF THE ARGUMENT.

I.

Chaffee's transfer was within his power and good.

It is the law in Connecticut that it is a corporation's right and it is its duty to pay a debt. The fact that it operates to prefer the particular creditor paid makes no difference. *Smith* vs. *Skeary*, 47 Conn., 47, the text of the opinion in which will be quoted presently.

With these matters in mind let us read the by-law:

"The Board of Directors shall annually elect a general "manager who shall have ENTIRE *charge of the business* "*and* AFFAIRS of said company subject to the order and "approval of the Board of Directors" (R. p. 63).

No exception is made as to the company's being a *not going* concern. Nor is the power limited to the time *while it is a going cancern.* Chaffee was to have ENTIRE charge of the "AFFAIRS" as well as the business of the company.

In *Lewis* vs. *Hartford Silk Manf. Co.*, 56 Conn., 25, there had been a mortgage of its real estate made by the corporation to the plaintiffs to secure anvances not to exceed $100,000. They had made advances to $151,000, and ginghams had been given them by the manager for the rest. The question was whether they could hold the ginghams *in addition* to the mortgage.

The court said (p. 37), by Judge Pardee, the whole Court concurring in *the opinion* (p. 40):

"On or about July 9th, 1885, T. F. Plunkett, the presi- "dent and principal business and financial manager of the "Silk Manufacturing Company, requested the plaintiffs "to make advancements to the company in addition to "those contemplated and secured by mortgage, and verb- "ally agreed that these should be secured by the mort-

"gage, by the ginghams previously and subsequently con-
"signed to them, and by the Flat Top Coal Company's
"stock pledged by Bartholomew. Requests for additional
"advancements were renewed from time to time by Plun-
"kett, and on some of the later occasions Bartholomew
"was present. Upon such requests and agreement the
"plaintiffs, between July 9th, 1885, and September, 1886,
"advanced the sum of $51,000 to the company. *There*
"*was no vote either of its stockholders or directors au-*
"*thorizing such borrowing or agreement. No such vote*
"*was necessary to make the acts of Plunkett binding*
"*upon the corporation.* Having made him its principal
"and general financial manager and agent, with no limit-
"ation upon his power, and having notified all persons
"concerned of such appointment, the company is
"bound by his act of borrowing for its
"benefit, and of pledging ginghams or any other
"personal property for repayment. He was
"clothed with power to borrow money for its necessary
"and proper uses from any person who would lend; to
"sell ginghams, and repay; or consign ginghams with
"leave to retain the proceeds; or use any other property
"for that purpose. And as in these matters in legal con-
"templation he was the corporation, he could bind it as
"effectually as it could bind itself by corporate vote when
"taking up money, by an agreement that payment should
"be secured by the previous mortgage, provided (in the
"interest of other creditors) the aggregate should not ex-
"ceed the extreme limit of $100,000. *Of course, a corpo-*
"*rate vote was necessary* to a valid mortgage by its finan-
"cial agent *of the real estate* of the Silk Manufacturing
"Company to the plaintiffs. *But all money or other*
"*personal property or rights therein, coming into its*
"*possession because of the mortgage security thus given,*
"*were at the disposal of its general, unlimited financial*

" *agent*, equally with any other personal property belong-
" ing to it. A corporate vote is not made necessary to the
" valid disposition of this right in personal property, be-
" cause of the mention of it in a sealed instrument.
" Therefore, if we should concede that, as against the plain-
" tiffs, the agreement between them and the Silk Manufac-
" turing Company constituted a valuable right in the pos-
" session of the latter, *nevertheless Plunkett had absolute*
" *power of disposal of this right for its benefit. He could*
" *exchange, sell, pledge or annul it by his individual*
" *action, at his discretion.* Presumably the agreement
" by the mortgagor to deliver and by the mortagee to re-
" ceive ginghams in payment was for the benefit of the
" latter, and although it has a place in the condition of
" the mortgage, they were under no obligation to see in it
" any limitation upon the power of the mortgagor's general
" financial agent thereafter to borrow, if they should be
" willing to lend, other and additional sums for its benefit,
" and make payment therefor in money, ginghams, or any
" other personal property. The purpose of the mortgagor
" was to give satisfactory security for the loan of $100,000;
" not at all to bar itself from borrowing other money, if a
" willing lender could be found.

" *As it is the company's duty always to pay its debts,*
" *the application of any of its personal property or rights*
" *in stock* AT ANY TIME *to that use by its accredited finan-*
" *cial agent, without limitation, is binding upon it.*"

Although not discussed in the opinion, it appeared in the case that all the ginghams had been given for past due debt, as it did in *Sherman* vs. *Fitch*, 98 Mass. 59.

II.—*But the transfer* HAD *the authority of the directors.*

In *Railway Companies* v. *Keokuk Bridge Co.*, 131 U. S. 371, the Court, speaking by Mr. Justice Gray, said:

P. 381—" When the president of a corporation

"executes, in its behalf, and within the scope of its "charter, a contract which requires the concurrence "of the board of directors, and the board, knowing "that he has done so, does not dissent within a rea- "sonable time, it will be presumed to have ratified "his act. *Indianapolis Rolling Mill* v. *St. Louis*, "*&c., Railroad*, 120 U. S. 256."

In *Fitzgerald Construction Co.* v. *Fitzgerald*, 137 U. S. 98, the Court, speaking by Mr. Chief Justice Fuller, said:

P. 109—"These instructions were justified under "the evidence. If the moneys were used to pay off "indebtedness of the company arising in the con- "struction of the road, and for work done under "proper authority, the transactions were in pursu- "ance of the authorized purposes of the corporation, "and occurred in its legitimate business. The execu- "tion of the paper could not be held to be in excess "of the powers given, and it was clearly the duty of "the directors to give contrary instructions if they "wished to withdraw the general management from "the president; and to disaffirm the action of their "agents promptly and at once if they objected to it. "*Indianapolis Rolling Mill* v. *St. Louis, &c., Rail-* "*road*, 120 U. S. 256; *Cresswell* v. *Lanahan*, 101 "U. S. 347."

The case of

Indianapolis Rolling Mill v. *St. Louis, etc., R.R.*, 120 U. S. 256,

was this: There was a contract by which defendant bought of plaintiff ten thousand tons of iron rails to be delivered between June and October. On the 4th of October drafts to the amount of $54,000, part payment for the iron delivered, were due, and the agent of defendant agreed to pay them, if the plaintiff would make a release for the

balance of the contract. Such a release was signed "Indianapolis Rolling Mill Co., by J. Thomas, treasurer," 8 February. Thomas signed by the direction of one Jones, who was both president and superintendent. The by-laws declared (p. 283) that the superintendent "shall have "charge of the works, property and operations of the "company, and shall employ all operatives and certify "all wages due and other expenses to the secretary, "* * * and shall, with the approval of the president, "buy and sell material and make all contracts for the "same, and for work," etc.

Another by-law declared that "the superintendent and "all other persons shall in all cases be subject to the "control of the board of directors in everything where the "board shall elect to exercise such control."

The trial court found "that after the return of Mr. "Thomas from the City of New York to Indianapolis, "some time in March, there was a meeting of the board "of directors of plaintiff, at which the validity of the "release executed by Mr. Thomas was discussed; but the "records do not show that at that particular meeting any "definite action was taken; that the directors at that "meeting did in fact agree to submit the question to "counsel of plaintiff, let him investigate it, and then "act upon his advice; that about two years after this meet- "ing, and a year and a half after this suit was commenced, "a *nunc pro tunc* entry was made upon the records of "plaintiff of the proceedings of plaintiff's board of direc- "tors, which showed a repudiation upon the part of the "board of directors of the release so executed, and that "this suit was originally instituted in this Court at the "first term thereof after the execution of the release."

"The Court, speaking by Mr. Justice Miller (p. 259):

"We concur with the Court below that on the facts "thus stated the release was a valid release. Its execu-

"tion was of that class of business which, under the by-
"laws of the corporation and the course of business
"between these parties, had been confided to the presi-
"dent and superintendent, both of which offices were
"held by Mr. Jones. The direction given by Mr. Jones
"to the treasurer, Mr. Thomas, both of whom were also
"directors in the corporation, was within the line of his
"authority. He had under this same authority without
"any express resolution or direction of the board of
"directors, made the contract on which this suit is
"brought; and it would seem that, not being under seal,
"a simple contract concerning the ordinary business of
"the company, the same power which enabled him to
"make it was sufficient to enable him to release it, unless
"the power had been withdrawn.

"Another principle leads to the same result. These
"by-laws show that the board of directors retained the
"power in their hands to control the president and super-
"intendent in any transaction, whenever it was thought
"proper to do so. This matter was reported to the
"directors; they had a meeting upon the subject some
"six weeks after the whole thing had been consummated,
"and after they had received the benefit of the release by
"the payment of their drafts. The rule of law upon the
"subject of the disaffirmance or ratification of the acts of
"an agent required that if they had the right to disaffirm
"it they should do it promptly, and if after a reasonable
"time they did not so disaffirm it, a ratification would be
"presumed. In regard to this it appears that the board,
"when notified of what had been done by their agents,
"did not disaffirm their action at that time, but that the
"act or resolution of disaffirmance was passed about two
"years after notice of the transaction, and that if the suit
"brought in this case can be considered as an act of dis-
"affirmance, it came too late, as it was commenced some

" *six months after they had knowledge of the release.*
" As was stated in the somewhat analogous case of the
" *Twin Lick Oil Co.* vs. *Marbury*, 91 U. S., 592, 'the
" 'authorities to the point of the necessity of the exercise
" 'of the right of rescinding or avoiding a contract or
" 'transaction as soon as it may be reasonably done, after
" 'the party, with whom that right is optional, is aware
" 'of the facts which gave him that option, are numerous.
" '* * * The more important are as follows: *Badger* vs.
" '*Badger*, 2 Wall., 87; *Harwood* vs. *R.R. Co.*, 17 *id.*, 78;
" '*Marsh* vs. *Whitmore*, 21 *id.*, 178; *Vigers* vs. *Pike*, 8 Cl.
" '& Fin., 650; *Wentworth* vs. *Lloyd*, 32 Beav., 467; *Fol-*
" '*lansbee* vs. *Kilbreth*, 17 Ill., 522; S. C., 65 Am. Dec.,
" '691.' See also *Gold Mining Co.* vs. *National Bank*,
" 96 U. S., 640; *Law* vs. *Cross*, 1 Black, 533.

And the same is the law of Connecticut.

In

Lewis vs. *Hartford Silk Manf. Co.*, 56 Conn., 25,

already quoted, the court said, p. 39: "Moreover, upon
" the record there was such corporate ratification of
" Plunkett's acts as would have established them in
" the absence of any previous authority. On June 30th,
" 1885, the plaintiffs had advanced to the Silk Manu-
" facturing Company the full sum of $100,000, for security
" of which the mortgage was given, and by mistake
" $6,000 in excess. On January 1st, 1886, they gave the
" company written notice that they had advanced ad-
" ditional sums to it and had applied towards the pay-
" ment therefor the proceeds of the ginghams which it
" had consigned to them, and which were referred to in
" the condition of the mortgage. The company received
" this notice and made on its own books a like credit upon
" a like account. Silence then imposes silence now upon
" it in reference to this transaction. The result is an

"actual application of the proceeds of the ginghams by "the plaintiffs to the repayment of the last advances with "the knowledge and assent of the Silk Manufacturing "Company."

The above is the general and well-settled doctrine,

But

it is equally well settled that the rule is the same where the transaction is made known to the directors INDIVIDUALLY *and not at a meeting.*

In *Creswell* v. *Lanahan*, 101 U. S. 437, the Court, speaking by Mr. Justice Swaye, said:

P. 352—"The transaction, like all others, *was* "*made known to the trustees individually*, and they "never objected. This intelligent acquiescence was "a binding ratification. *Kelsey* v. *National Bank* "*of Crawford County*, 69 Pa. St. 426; *Hilliard* v. "*Goold*, 34 N. H. 230; *Christian University* v. *Jor*"*dan*, 29 Mo. 68; *Sherman* v. *Fitch*, 98 Mass. 59.

"The arrangement was first challenged after the "company became bankrupt and went into the hands "of appellants.

"The company was concluded and the appellants "can be in no better position."

And the cases cited fully bear out the proposition.

Kelsey v. *The Nat. Bk. of Crawford County*, 69 Pa. St. 426:

(Headnote)—"Upon the discovery of the robbery of a "bank, a minority of the directors and the cashier met "with a detective in the bank; the cashier with the "advice of those directors offered a reward for the money "and the thief, and sent to different places telegrams "containing the offer; all the directors lived in the same "place; they did not disavow the cashier's act; the de"tective arrested the thief and obtained the money. "*Held* to be evidence of ratification by the bank."

And the court, speaking by Williams, *J.*, said:

(p. 430.) "Nor was it necessary, in order to bind the "bank by their acquiescence, that notice should have "been given to the directors, when sitting in their official "capacity as a board. If they were personally cog- "nizant of the offer made by the cashier, it was their "duty to call a meeting of the board and disavow the act, "if they were unwilling that the bank should be bound "by it."

Sherman v. *Fitch*, 98 Mass. 59:

The president of the Northampton Sugar Refining Company mortgaged in the name of the company all the machinery in its sugar house and its "Refinery" to Fitch to secure a precedent debt of eighteen thousand dollars, which the company owed Fitch. This was known to all the directors but one, "and was approved by them, pro- "vided their neglect to make any objection to the same "can be construed as an approval."

The court speaking by Wells, *J.*, said:

(p. 64.) "The remaining consideration relates to the "authority of Sampson to execute the mortgage in behalf "of the corporation. It is not necessary that the au- "thority should be given by a formal vote. Such an act "by the president and general manager of the business "of the corporation, with the knowledge and concurrence "of the directors, or with their subsequent and long- "continued acquiescence, may properly be regarded as the "act of the corporation. Authority in the agent of a "corporation may be inferred from the conduct of its "officers, or from their knowledge and neglect to make "objection, as well as in the case of individuals. *Em-* "*mons* v. *Providence Hat Manufacturing Co.*, 12 Mass. "237; *Nelledge* v. *Boston Iron Co.*, 5 Cush. 158; *Lester* v. "*Webb*, 1 Allen, 34. The absence of one of the directors "in Europe could not deprive the corporation of the

" capacity to act and bind itself by the act of the officers " in active charge of its affairs."

Hilliard v. *Goold*, 34 N. H. 230:

Statute required rates of fare to be established by " every railroad *corporation*."

Rates in this case were established by the president. There was no proof of any action by the directors, either way.

Christian University v. *Jordan*, 29 Mo. 68.

A statute of Missouri provided that anybody receiving and paying out bank notes of less denomination than five dollars could not recover on contracts. The Christian University sued Jordan on a contract. Jordan pleaded in bar that it had received and paid out bank notes of less than five dollars—and proved that one Hatch, the treasurer of the University had done so. It was proved that there was no direction " upon the part of said corporation " to Hatch, " as to what kind of money he should receive or " pay out."

III.—*The fact of the appointment of the receiver had no effect upon Fenton and Wilson in the way of their being directors, and gave them no excuse for acting as they did: that is, declining to act as directors at all.*

Of course the appointment of the receiver affected only the property of the company which was in Connecticut, and without a dissolution of the company or an injunction enjoining the directors from acting, their duties as well as their powers as directors continued.

The common law and the special statutes of Connecticut applicable to this matter were as follows:

In *Smith* vs. *Skeary*, 47 Conn., 47: " A corporation " transferred a quantity of its goods to two of its direc- " tors, to be sold by them and the proceeds applied in

"payment of a joint claim of large amount which they "had against it. The corporation was in fact insolvent" (p. 47). Proceedings in insolvency were not begun within sixty days.

The court said (p. 54), by Judge Carpenter, the whole court concurring:

"We are unable to discover any principle of law which "renders the transaction fraudulent. *The corporation had "a right, and it was its duty, to pay this debt. These "creditors had a perfect right to receive pay in money or "goods*, and the fact that they were stockholders and "directors did not modify or abridge that right, so long "as there was no actual fraudulent intent. *The fact, if "it be a fact, that it operated to prefer these creditors, is "not sufficient at common law to stamp it as fraudulent, "for the common law favored the vigilant, and a credi-"tor might lawfully obtain a preference.* It does not "become fraudulent under our insolvent laws, because no "proceedings in insolvency were instituted in due time, "so that the case cannot be brought within the operation "of those laws. *The consideration was good and "adequate*, so that there is no badge of fraud in that re-"spect."

Section 501 of the General Statutes of Connecticut was and is as follows:

"Sec. 501. All transfers of property by any person in "failing circumstances, with a view to insolvency, shall "be void, unless made by a written assignment for the "benefit of all creditors in proportion to their respective "claims, embracing all the property of the assignor, "except such as is exempt from execution, real estate "situated out of this State, and, in case of sole assignors, "one hundred dollars in cash, and lodged for record in "the office of the Court of Probate having jurisdiction."

"Sec. 504. No transfer of property otherwise valid shall

"be made void by any provision of this chapter, unless "within sixty days after such transfer proceedings shall "be instituted for the purpose of carrying the estate of "the party making such transfer into settlement as an "insolvent estate,——

Sections 501 and 504 are parts of Chapter LII. and Title 13 of the General Statutes.

Title 13 is entitled "Courts of Probate; Their Powers "and Jurisdiction," and consists of fourteen chapters—XLII. to LV., inclusive—and two hundred and nineteen sections—430 to 648, inclusive.

Chapter XLII. is entitled "General Provisions." It consists of sixteen sections—430 to 445, inclusive—and provides for the organization and powers of the Courts of Probate; the election of the judges of those courts and such matters.

Chapter LII. is entitled "Insolvent Debtors" and consists of thirty-five sections—501 to 535, inclusive.

Sec. 501 is the section above quoted—"All transfers of "property by any person in failing circumstances with a "view to insolvency, shall be void unless," &c.

Secs. 501 and 502 provide for the "lodging" by the "assigning debtor" of an assignment for all his creditors in the "office of the Court of Probate," and expressly and in terms applies to corporations.

Sec. 504 is the section already quoted, which provides that "no transfer of property otherwise "valid shall be "made void by any provision of this chapter, unless "within sixty days after such transfer proceedings shall "be instituted for the purpose of carrying the estate of "the party making such transfer into settlement as an "insolvent estate."

Sec. 507 provides for compulsory proceedings in insolvency by petition by a creditor to the Court of Probate,

in which proceeding the Court of Probate appoints a trustee.

Sec. 511. The Court of Probate to appoint a trustee under the voluntary assignment made according to Section 501.

Sec. 523. Commencement of proceedings in insolvency dissolves all attachments and all levies of executions made within sixty days next preceding

Sections 511–533 relate to the powers of above "trustees" and the settlement of the insolvent estate by them; and particularly mention (Sec. 519) "trustees in insolvency "of the estate of corporations."

Section 524 is as follows:

Page 132: "SEC. 534. *All proceedings for the settlement of the estate of insolvent, debtors shall be had "in the Court of Probate of the district* in which such "debtor or one of such debtors resides, *except that in the "case of copartnerships and corporations* all such proceedings shall be had in the Court of Probate of the district within which such copartnership or corporation had "its office or principal place of business. In case of a "non-resident debtor owning property within this State, "the proceedings shall be had in the district in which "such property, or any part of it, may be found situated. "*The date of the commencement of proceedings in insolvency shall be deemed to be that of the lodgment of the "assignment for record, or of the filing the petition for "the appointment of a trustee.*"

The foregoing are the statutory provisions in regard to proceedings in insolvency.

The following is the statutory provision for receivers of this sort of corporation:

TITLE XXX.

Private Corporations.

Chapter CXIX.

"Sec. 1942. The Superior Court in the county in "which any corporation, organized under the laws of this "State, has its principal place of business, may, as a "court of equity, on the application of any of its stock-"holders, wind up its affairs and dissolve it, *if said "Court shall find that said corporation has voted to "wind up its affairs, or abandoned the business for "which it was organized, and has thereafter neglected "within a reasonable time or in a proper manner to "wind up its affairs and distribute its effects among "its stockholders;* and for this purpose may, if it deem "it necessary, appoint one or more receivers of the estate "of said corporation, and limit a time for its creditors to "present their claims to such receivers, and direct public "notice thereof to be given; and all claims not presented "within such time shall be barred. Said receivers shall "allow all just claims against said corporation, collect its "debts, sell its property, and convert the same into "money, and report their doings to said court as it may "direct. Said court may, on complaint of any person "aggrieved by such doings, grant such relief as the nature "of the case may require; and it may make such orders "as to the doings of the receivers, their compensation, "and other expenses, and as to the payment of debts and "distribution of the effects of said corporation, as may be "just and conformable to law."

There are special statutes in regard to Insurance Companies, banks' and railroads, but the above is the only one which applies to this sort of corporation.

Insolvency is therefore not one of the grounds for the appointment of a receiver of a corporation by the Superior Court.

All insolvency proceedings must be in the Court of Probate.

I am informed that, in practice, if it is made to appear to the Superior Court after it has appointed a receiver that the corporation is in fact insolvent, the Court will permit a petition in insolvency to be filed in the Court of Probate; and that this has been frequently done on the suggestion of the Court itself, when it had been ascertained that the corporation was insolvent.

It thus appears that the whole subject of insolvency and the settlement of insolvent estates is left exclusively to the various Courts of Probate.

This further appears from a comparison of Chapter 69 of the Laws of 1895, with Section 523 of the General Statutes already referred to.

They are as follows:

"SEC. 523. The commencement of "proceedings in insolvency shall "dissolve all attachments and all "levies of executions not com- "pleted, made within sixty days "next preceding, on the property "of the insolvent debtor; but if "the property is subsequently taken "from the trustee, so that it cannot "be used for the benefit of the "creditors of the estate, or if the "trust shall be terminated by order "of the Court, said attachments and "levies of execution shall revive, "and the time from the commence- "ment of proceedings in insolvency "to the time when the trustee shall "be dispossessed of the property, or

PUBLIC ACTS CONN., 1895.

"CHAPTER XCVI.

"AN ACT concerning Receivers of "Corporations and Copartner "ships:

"The commencement of proceed- "ings for the appointment of a re- "ceiver of a corporation or a co- "partnership shall dissolve all "attachments and all levies of "executions, not completed, made "within sixty days next preceding, "on the property of such corpora- "tion or copartnership; but if the "property is subsequently taken "from the receiver, so that it can- "not be used for the benefit of the

"when such trust shall be terminated, shall be excluded from the computation in determining the continuance of the lien created by such attachment; but the attaching and levying creditors shall be allowed the amount of their legal costs, accruing before the time of the appointment of a trustee, which shall be paid as hereinafter provided, and in the order of such attachments and levies, if their respective claims shall, in whole or in part, be allowed by the commissioners."

"creditors of said corporation or said copartners, nor made subject to the orders of the court in the settlement of the affairs of said corporation or copartnership, or if the receivership shall be terminated by order of the court, pending the settlement of the affairs of the corporation or copartnership, said attachments and levies of execution shall revive, and the time from the commencement of such proceedings to the time when the receiver shall be dispossessed of the property, or the finding of the court that said property is not subject to the orders of said court, or when said trust shall be terminated, shall be excluded from the computation in determining the continuance of the lien created by such attachment; but the attaching or levying creditors shall be allowed the amount of their legal costs, accruing before the appointment of a receiver, as a preferred claim against the estate of said corporation or copartnership, if their respective claims upon which the attachments are founded shall in whole or in part be allowed.

"Approved: April 25, 1895."

Receivers of dissolved copartnerships are provided for by Sections 1313 and following General Statutes.

It is quite apparent that the framers of this act of 1895 considered a receivership *not* a proceeding for the settlement of an insolvent estate.

The complainants, and any other creditor, could have avoided the transfer by beginning proceedings in insolvency, in due time, in the Court of Probate.

No one, however, did so, and it follows that the transfer is saved by Section 504.*

II.

The sale was not void because of the facts found in regard to the possession.

Judge Grosscup did not put his decision upon this ground, so far as appears.

The reasoning of the Court of Appeals upon this subject is expressed in the following words:

"Another ground on which the sale was clearly invalid "is the finding of the Court that the sale was not fol- "lowed by an open or visible or notorious change of "possession or ownership, unless, as matter of law, the "the facts stated in the finding constituted sufficient in- "formation to the public of the change. The facts so "stated were evidentiary only, and, instead of being con- "clusive of publicity, tended rather to show intentional "concealment. They were certainly sufficient, even if "we were required to look into the evidence, to support "the finding of the ultimate fact. The sale was therefore "void under the law of Illinois, which 'will not permit "'the owner of personal property to sell it and still con- "'tinue in the possession of it.' Green *v.* Van Buskirk, "7 Wall., 139; Henry *v.* Locomotive Works, 93 U. S., "664; Martin *v.* Duncan, 156 Ill., 274; Harkness *v.* Rus- "sell, 118 U. S., 663: Pullman Car Co. *v.* Pennsylvania, "141 U. S., 18.

"It is urged that while the Federal courts follow the "rule of the State that a transfer of personal property, "where the vendor is permitted to remain in possession, "is fraudulent and void as to creditors, the Federal courts "are not bound to give heed to the opinions of the "supreme court of Illinois upon matters of fact, and that "what will constitute a sufficient change of possession "must necessarily be determined upon the facts of each

"case. That may be conceded: but the court here having "determined the fact against the appellant, whether "according to the weight of the evidence or not, the find- "ing, by the authorities already cited, cannot be re- "viewed."

The rule thus stated is not, in this case, violated. The owner of the personal property here did NOT "sell it *and* "STILL *continue in the possession of it.*"

There *was* an ACTUAL and *total change of possession.*

The question is whether the change was sufficiently notorious and visible—or rather whether, under the circumstances of this case, "sufficient" or *any* "information "to the public" was necessary.

The giving of the bill of sale and the actual change of possession took place on the 25th of April, 1895—in Chicago. On the 26th of April—*the next day*—the receiver was appointed in Connecticut, qualified and took possession (R., p. 14).

It is therefore utterly impossible that the public or anybody could have been deceived or injured, for the simple and conclusive reason that the Natchaug Company could no longer either borrow money or buy raw material; even if there were anybody who, under such circumstances, would have lent it money, or sold material to it on credit.

None of the cases cited by the Court of Appeals need consideration except *Martin* v. *Duncan*, 156 Illinois, 274, because, in all of the other cases, the vendor continued in possession.

Martin v. *Duncan* was this: Duncan being in possession of goods as agent of the vendor, *who was his brother*, the vendor made to him a bill of sale of them for an alleged debt for money loaned and for unpaid salary —with a covenant to reconvey provided the vendor paid the money in thirty days. The court held that the

question of good faith in the transfer was for the jury, and it is plain that it was, upon other grounds than the matter of possession. But the court beside this, *said* (156 Illinois, 280):

"When the known and previously recognized *agent* of "an alleged vendor *remains in possession*, the appear- "ance to the world is the same as though the vendor him- "self remained in possession, unless there are substantial "and visible signs of a change of title. (*Flanagan* v. "*Wood*, 33 Vt. 332.)"

The Court also cited a Missouri case—but as that was decided under the Missouri statute which required a "delivery" and "an actual and continued *change* of "the possession of the things sold" it does not apply. Nevertheless *in that case—Claflin* v. *Rosenberg*, 42 Mo. 439—it was said by the Court (p. 450) "There must be a "complete change of the dominion and control over the "property, and some act which will operate as a divesti- "ture of title and possession from the vendor, and a "transference into the vendee. This necessarily excludes "the idea of a joint or concurrent possession. It may not "be essential or indispensable that the goods should be "moved into a new or different house but there must be "some open, notorious, or visible act, clearly and une- "quivocally indicative of delivery and possession, *such as* "*taking an invoice*, putting up a new sign, or any other "reasonable means which would impart notice to a prudent "man that a change had taken place. The statute provides "that the change shall be actual and continued; it must, "therefore, be neither formal nor temporary; but where "the whole law has been complied with, we see nothing "to prevent the employment of the vendor to render "services in and about the property, in the same manner "as any other agent or employee."

It is quite plain that the facts here come within the

above language *for Stanton took an inventory (invoice) and delivered it to the attorney for the plaintiff;* opened a new set of books; billed all the sales which he made in the name of the plaintiff, and put the proceeds—some $7,000—to the plaintiff's credit—R., p. 14.)

There was not then and is not now any such statute in Illinois, as that Missouri statute; the statute applying being (§ 4 of Ch. 59; Starr & Curtis, Statutes 1885, p. 1196) as follows:

"§ 4. Every gift, grant, conveyance, assignment or "transfer of, or charge upon any estate, real or personal, "or right or thing, in action, or any rent or profit thereof, "made with the intent to disturb, delay, hinder or de-"fraud creditors, or other persons, and every bond, or "other evidence of debt given, suit commenced, decree or "judgment suffered, with like intent, shall be void as "against such creditors, purchasers and other persons."

In other words the statute of Elizabeth.

The Vermont case was the case of a hired man living on a farm with the debtor, who was also the owner. An attachment levied on cows on the farm; the hired man agreeing with the attaching creditor to become *his* hired man, and the debtor giving to the attaching creditor a lease of the farm, which was not recorded. But everything else went on as before, and to the outward eye, the debtor (former owner) was still in possession of the cows.

In *Warner* v. *Norton*, 20 How., 448, which was an Illinois case, the proof was that one Haskins had a hardware store and tinshop—and "that *while he was absent* "the business was conducted by one Atherton, his head "clerk, who employed the operatives and superintended "their work." That Haskins sold his whole stock to certain creditors, they cancelling his debts to them and giving notes to Haskins for the balance of the price agreed

on and "thereupon by way of putting the purchaser in "possession, Haskins, Anderson" (agent of the creditors) "and Atherton, being in the store room, Haskins got the "key of the outer door, and gave it to Anderson, and "Anderson gave the key and charge of the store and tin "shop to Atherton, who, up to that time had been carry- "ing on the business for Haskins, but then undertook to "act for Anderson.

"Anderson and Haskins left La Salle, and did not re- "turn until after the" goods had been attached by others (20 How., 457).

Haskins was then in "failing circumstances."

"Atherton continued to control the goods and business "as before, and to all appearances was doing so for Has- "kins; that sales were made to customers as formerly, "without notice to any one of the change of proprietors, "and, in some instances the bills and receipts of sales to "customers were made out in the name of Haskins. No "change was made in keeping the books; that the servants "and operatives about the store and tin shop continued to "work under the direction of Atherton, with no knowl- "edge of any sale, and supposing the business was being "carried on as formerly, and for the use of Haskins; but "it did not appear that any of these things were author- "ised by the plaintiffs" (Anderson) "or known to them; "and that this condition and course of things continued "until the goods were seized by the sheriff" (20 How., 458).

"The trial court charged that if the jury believe from "the evidence the sale was made for the purpose of hind- "ering, delaying or defrauding creditors, it was invalid "as against the defendant; and that whether the sale was "or was not fraudulent was a question of fact, to be de- "termined by the jury under all the circumstances of the "case. That if the sale were secret, and no means taken

12948

" to apprise the public of it, these were facts which threw " suspicion upon the transaction, but did not make the " sale fraudulent in law as against the defendant" (p. 458).

The Court, speaking by Mr. Justice McLean, said:

(p. 460.) " But the case before us is not similar to that " of Hamilton *v.* Russell. There was a change of pos- " session in the goods purchased by Anderson, by the de- " livery to him of the key of the outer door of the store- " house, which he delivered to Atherton, who had agreed " to continue in the business as the agent of the pur- " chasers. From the time of the purchase, Haskins had " no possession of the property, nor did he exercise any " acts of ownership over it. He was absent from La Salle " from the time of the sale until after the attachment was " laid.

" Now, whether this was a colorable delivery or not, " was a matter of fact for the jury, and not a matter of " law for the Court."

The reasons given for rule are as follows:

Towne's Case, 3 Co. 816.

" The donor continued in possession, and used them as " his own; and by reason thereof he traded and trafficked " with others, and defrauded and deceived them."

Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and a trust is the cover of fraud.

Flanagan v. *Wood*, 33 Vt., 332; the Vermont case cited in *Martin* v. *Duncan*, (156 Ill., 274).

" The reasons upon which our policy was founded are " admirably set forth by Judge Prentiss in *Weeks* v.

" *Weed*, 2 Aik. They are, first to diminish fraudulent " sales, in fact, by preventing the debtor from securing a " benefit to himself by depriving him of the possession of " the property; and secondly, to prevent the public from " being misled to give a false credit to the former owner " who, by continuance in possession after a sale would " appear to the world as the true owner."

The findings here establish the facts.

1. That the vendor could not deceive the public because of the possession of the goods.

2. That there could not have been any trust for the vendor.

3. And the delivery of possession could not have been colorable.

They therefore established the fact that the sale was not made with the intent to hinder and defraud creditors.

In addition to the statute of Illinois above cited there is this further statute—(§ 6 of Ch. 59; Starr and Curtis, Statutes, 1885, p. 1199).

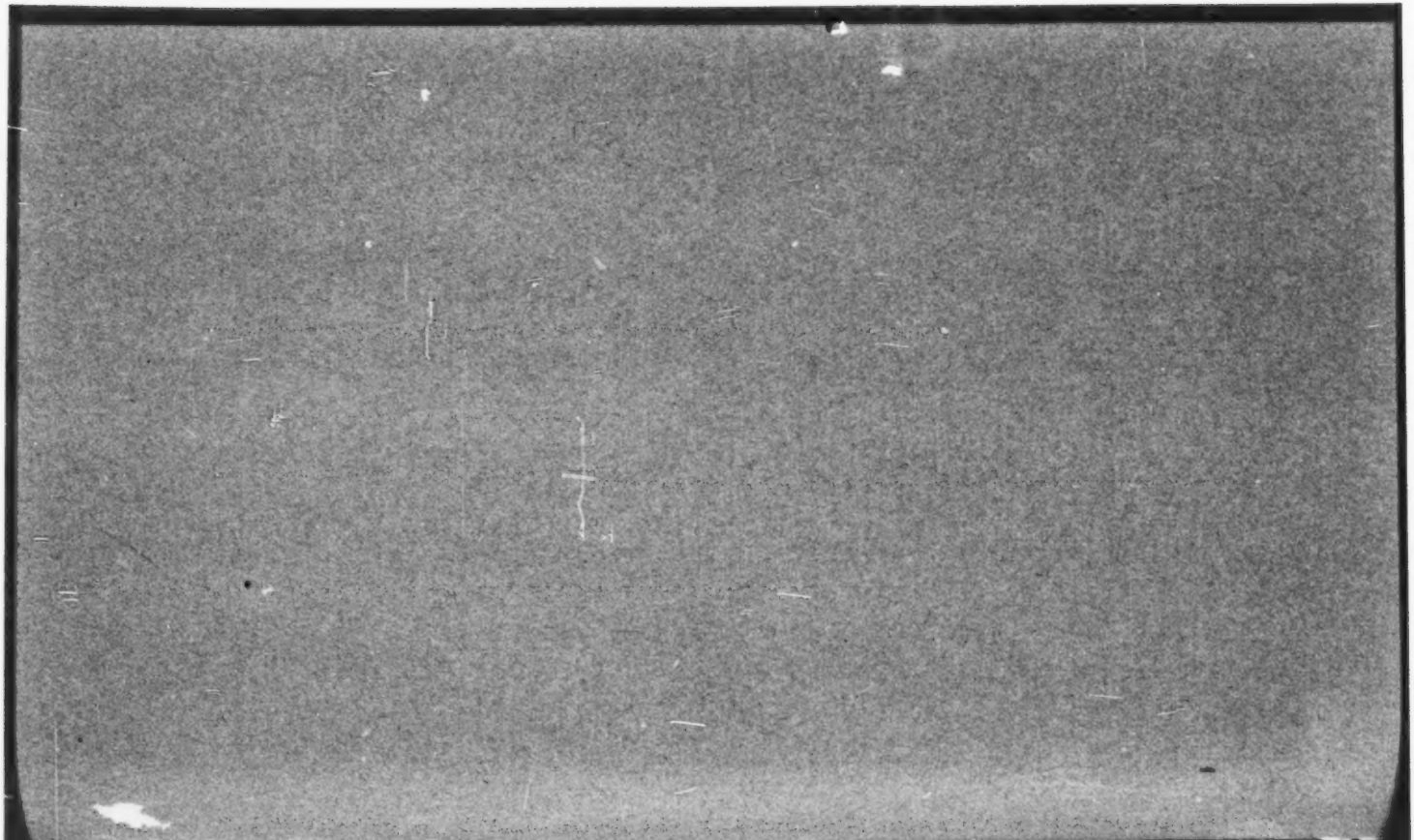
" § 6. Every conveyance of goods and chattels on con- " sideration not deemed valuable in law shall be taken to " be fraudulent, unless the same be by will duly proved " and recorded, or by deed in writing duly acknowledged " or proved, and recorded as in the case of deeds of real " estate, or *unless possession shall really and* bona fide " *remain with the donee.*"

The judgment should be reversed.

EDWARD WINSLOW PAIGE,
Of Counsel.

12949

[redacted]



IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

No. 97.

MICHAEL F. DOOLEY, as Receiver, etc.,
Plaintiff in Error,

vs.

JAMES PEASE,
Defendant in Error.

Error to Circuit Court of Appeals, Seventh Circuit.

STATEMENT OF THE CASE.

The Natchaug Silk Company was a Connecticut corporation, carrying on the business of manufacturing and selling silk goods at Willimantic, Connecticut.

The First National Bank of Willimantic, Connecticut, as its name implies, was a national bank doing business at Willimantic.

On January 1, 1895, the Silk Company was indebted to the bank in the sum of several hundred thousand dollars. The Silk Company had been long prior to that time hopelessly insolvent, and this fact was known to the bank. (Rec., p. 16; Par. 33.)

One Risley was an officer of said Silk Company, having

entire charge of its financial affairs. (Rec., p. 14; Par. 7.)

About this time, and for the purpose of obtaining credit for the Silk Company, certain false and fraudulent statements as to the assets and liabilities of the company were made up by Risley and were sent to Morimura & Co., and the China and Japan Trading Company (hereinafter known as the attaching creditors), dealers in raw silk, for the purpose of deceiving them as to the condition of the Silk Company and causing them to furnish raw silk on credit to the Silk Company, to be manufactured into goods. (Rec., p. 17; Par. 33.)

The making of these fraudulent statements was participated in by the bank (Risley being the cashier of the bank). Said fraudulent statements indicated that the Silk Company was solvent, and further represented that the said company was about $200,000 better off than it really was. Risley knew the amount of the indebtedness to the bank, and knew that this large indebtedness rendered said company insolvent, but in said statements he falsely and fraudulently concealed such fact. (Rec., p. 17; Par. 33.) Relying upon such statements, said raw silk dealers furnished raw silk to said company on credit, which they would not have done unless they had been deceived by said fraudulent statements. (Rec., p. 17; Par. 33.)

The raw silk thus furnished was manufactured into silk goods, a large portion of which (Rec., p. 17; Par. 33) were shipped to Chicago to be sold in the regular course of business in the branch store which said Silk Company maintained in Chicago.

On April 23, 1895, the bank failed and Michael F. Dooley was appointed its receiver. (Rec., p. 12; Par. 8.)

12952

On April 22, 1895, one Chaffee, president of the Silk Company, left Willimantic and went to New York, to Chicago and to Baltimore, and in these various places, in the name of the Silk Company, executed bills of sale of all the property belonging to the Silk Company in these different cities. When Chaffee started on this trip, he knew that the company was insolvent and was going into liquidation. (Rec., p. 15; Par. 17.)

This case has to do with only one of said attempted transfers, however, *i. e.*, the one which was attempted to be made in Chicago on April 25, 1895, when Chaffee, president of the company, executed in the name of the company a bill of sale of all the goods in the Chicago store, in favor of Michael F. Dooley, the bank receiver.

As before stated a large portion of the goods thus purporting to be transferred to Dooley was manufactured from the raw silk which had been obtained from these attaching creditors, by means of the false and fraudulent statements aforesaid.

On May 20, 1895, Morimura & Co. began an attachment suit in the Circuit Court of Cook County, Illinois, and pursuant to the writ issued in that case James Pease, sheriff, levied upon these goods in Chicago, as being the goods of said Silk Company. Afterwards, on May 24, 1895, the sheriff again levied upon the same goods by virtue of another attachment writ issued out of the same court against the same defendant, at the suit of China and Japan Trading Company.

Thereupon, Michael F. Dooley, receiver, as aforesaid, brought this suit in trespass against the sheriff for taking and carrying away said goods.

Dooley claims that at the date of the attachment the

goods had ceased to belong to the Silk Company, and had become his property by virtue of the supposed bill of sale, which the president of said company executed in his favor on April 25, 1895.

If the goods were still the goods of the Silk Company on May 20, or if the attaching creditors were at that time entitled to treat them as the goods of the Silk Company, then Dooley's suit fails; for it is admitted that the attachments were in all respects regular and valid.

On the trial below the sheriff contended that the bill of sale conferred no title on Dooley as against these creditors, for four reasons:

First. Because the president of the Silk Company had no authority to execute the bill of sale, and hence no title passed under it.

Second. Because there was no visible, outward or notorious indication of any change in title, or possession of the goods after the execution of the bill of sale, and hence it was fraudulent and void as against attaching creditors.

Third. Because the document executed by the president of the Silk Company, though in form an absolute bill of sale, was in reality merely collateral security, and hence was fraudulent and void as against the attaching creditors.

Fourth. Because the bank joined with the Silk Company in a collusive scheme to make false representations to the raw-silk dealers in order to secure credit for the Silk Company and to conceal the fact that the company was largely indebted to the bank, and that this indebtedness rendered the company insolvent, and hence the bank is estopped from asserting its claim in any form to the

12953

prejudice of the persons whom it deceived by these statements.

Evidence was introduced to support each one of these propositions, and the court below was, therefore, called upon to decide *four questions of fact:*

First. Did the president have authority to execute the bill of sale? (If *the fact* is that the president had no authority to execute the bill of sale, then *the law* is that the title did not pass out of the Silk Company.)

Second. Was there any visible, outward or notorious change in the possession of the goods under the bill of sale? (If *the fact* is that there was no visible, outward or notorious change of possession, then *the law* is that the bill of sale is fraudulent and void as to these creditors.)

Third. Did Dooley cancel any part of the indebtedness as a consideration of the giving of a bill of sale, or was it in reality given only as collateral security, the debt remaining as before? (If *the fact* is that no part of the debt was canceled, and the bill of sale was in reality merely collateral security, then *the law* is that it is fraudulent and void as to these creditors.)

Fourth. Did the bank join with the Silk Company in making false and fraudulent representations to the raw-silk dealers and in fraudulently concealing the fact that the company was largely indebted to the bank and that this indebtedness rendered the company insolvent? (If such were *the facts*, then *the law* is that the bank is estopped from asserting its claim in any form to the prejudice of the persons thus deceived.)

The lower court found the facts to be in favor of the sheriff on all of these propositions.

[redacted]

court's findings of fact, he has entirely omitted the specific findings which the court made on each of the four questions of fact above mentioned.

On the first point the court found:

"Chaffee (the president of the company) was not vested with authority to make this transfer by the charter of the company, nor by the by-laws, nor by any action of the board of directors, nor was his act ever ratified by the board of directors, or by the company, in any manner. He had never had authority vested in him at any time by the company to make this transfer or to make similar transfers. He had never made a transfer similar to this prior to starting on his trip, beginning April 22d, on which trip he purported to make the transfer in controversy.

The bank knew and Dooley knew that this act was an attempted preference on Chaffee's part in contemplation of the insolvency and liquidation of the company.

Chaffee had never during the business career of the company done any act in behalf of the company that would lead the bank or anyone else to suppose that he had been given the power by the company to dispose of its assets, by way of preference, in case of impending dissolution." (Rec., p. 15.)

On the second point the court found:

"There was no change in the title to or possession of said goods which was visible, open or notorious down to the date of the attachments. (Rec., p. 14; Par. 14.) There was nothing in the appearance of the store, outside or inside, to indicate that there had been any change in the title or possession to the goods, on or after April 25th, and until May 20th, the time of the attachment. (Rec., p. 15; Par. 23.) No advertisement was made of the transfer to Dooley, nor was any public notice given thereof. There was nothing to inform the public that any change had taken place in the ownership or possession of the goods between April 24, 1895, and the levy of the attachment on May 20, 1895.

12954

The change of ownership was not open, or visible, or notorious." (Rec., p. 16; Par. 29, 30, 31.)

On the third point the court found:

"No deduction from or cancellation of the debt to the bank or its receiver Dooley was made at the time of or by reason of the giving of said bill of sale; nor was any deduction from or cancellation of said debt made by said Dooley in his proof of claim against the receiver of said Silk Company, filed April 7, 1896, on account of or by reason of the giving of this bill of sale, although he had received the sum of $7,000 out of the sale of a portion of these goods." (Rec., p. 17; Par. 37.)

On the fourth point the court found:

"For the purpose of obtaining credit for the Silk Company, certain false and fraudulent statements as to the assets and liabilities of the Silk Company were made up by Risley and were sent to Moramuri & Co. and to the China and Japan Trading Company, dealers in raw silk, for the purpose of deceiving them as to the condition of the Silk Company and causing them to furnish raw silk on credit to the Silk Company, to be manufactured into goods. Risley was the cashier of the bank and a director in the bank. Fowler was a director in the bank and a director in the Silk Company. (Rec., p. 16; Par. 33.) Said fraudulent statements indicated that the Silk Company was solvent. Said fraudulent statements represented that said company was about $200,000 better off than it really was. Risley well knew the amount of the indebtedness to the bank, and knew that this large indebtedness rendered said company insolvent, but in said statements he falsely and fraudulently concealed such fact. Relying upon such statements, said raw silk dealers furnished raw silk to the company on credit, which they would not have done unless they had been deceived by said fraudulent statements. The entire amount of the claims of said attaching creditors was for raw silk furnished on the faith of these fraudulent statements. The raw silk thus furnished was manufactured into silk goods, which constituted a large part of the goods attempted to be transferred to Dooley." (Rec., p. 16; Par. 33.)

The facts having been found in favor of the sheriff in the court below, *there was nothing to be reviewed by the Circuit Court of Appeals and there is nothing to be reviewed here*, for no serious dispute is made as to the propositions of law upon which the court below decided the case, if the facts are as found.

12955

BRIEF.

I.

THE FINDINGS OF FACT BY THE LOWER COURT ARE CONCLUSIVE.

U. S. R. S., Sec. 1011.

Distilling & Cattle Feeding Co. v. *Gottschalk*, 13 C. C. A., 618.

Norris v. *Jackson*, 9 Wall., 125.

Martinton v. *Fairbanks*, 112 U. S., 670.

Stanley v. *Supervisors*, 121 U. S., 535.

Hathaway v. *Bank*, 134 U. S., 494.

Runkle v. *Burnham*, 153 U. S., 216.

St. Louis v. *Rutz*, 138 U. S., 226.

Smiley v. *Barker*, 83 F. R., 684.

II.

THE QUESTION AS TO THE POWER OF THE PRESIDENT TO MAKE THE TRANSFER IS ONE OF FACT.

III.

A DETERMINATION OF MIXED QUESTIONS OF LAW AND FACT CANNOT BE REVIEWED.

Norris v. *Jackson*, 9 Wall., 125.

Dennistoun v. *Stewart*, 18 How., 565.

Jewell v. *Knight*, 123 U. S., 426.

Smith v. *Kraft*, 123 U. S., 436.

Fire Ins. Co. v. *Wickham*, 128 U. S., 426.

IV.

CHAFFEE HAD NO POWER TO MAKE THIS TRANSFER.

First Nat. Bank v. *Co.*, 116 N. C., 827.
Norton v. *Bank*, 14 So. Rep., 872.
England v. *Dearborn*, 141 Mass., 590.
State Nat. Bank v. *Co.*, 68 Ill. App., 25.
Hadden v. *Linville*, 38 At. Rep., 37.

V.

A BILL OF SALE UNLESS FOLLOWED BY AN OPEN, NOTORIOUS AND VISIBLE CHANGE OF POSSESSION IS VOID. THE UNITED STATES COURTS WILL FOLLOW THE STATE LAW ON THIS SUBJECT.

Green v. *Van Buskirk*, 7 Wall., 139.
Hervey v. *Locomotive Works*, 93 U. S., 664.
Harkness v. *Russell*, 118 U. S., 663.

VI.

THE FINDING OF THE LOWER COURT AS TO THE WANT OF CHANGE OF POSSESSION IS CONCLUSIVE.

VII.

THE COURT'S FINDING IN THIS REGARD WAS CORRECT.

Martin v. *Duncan*, 156 Ill., 274.
Wright v. *McCormick*, 67 Mo., 426.
Mead v. *Noyes*, 44 Conn., 487.
Kirtland v. *Snow*, 20 Conn., 23.

12956

Norton v. *Doolittle*, 32 Conn., 405.
Fitzgerald v. *Gorham*, 4 Cal., 289.
Claflin v. *Roseberg*, 42 Mo., 439.
Mills v. *Thompson*, 72 Mo., 367.
Stewart v. *Nelson*, 79 Mo., 524.
Ticknor v. *McClellan*, 84 Ill., 474.
Gillett v. *Stoddard*, 30 Ill. App., 231.

VIII.

THE BILL OF SALE WAS IN REALITY A MORTGAGE AND WAS HENCE FRAUDULENT PER SE.

Beidler v. *Crane*, 135 Ill., 92.
Watkins v. *Arms*, 64 N. H., 99.
First Nat. Bank v. *Co.*, 43 Mo. App., 561.
Campbell v. *Davis*, 85 Ala., 56.
Sims v. *Gaines*, 64 Ala., 392.
Winkley v. *Hill*, 9 N. H., 31.
Halcome v. *Ray*, 1 Ired., 340.
Friedley v. *Hamilton*, 17 S. & R., 70.

IX.

THE BANK AND DOOLEY ARE ESTOPPED FROM ASSERTING ANY CLAIM TO THE PREJUDICE OF THESE CREDITORS.

Blennerhasset v. *Sherman*, 105 U. S., 100.
Bacon v. *Harris*, 62 F. R., 99.
Goll v. *Miller*, 54 N. W., 443.
Butler v. *Cockerill*, 73 F. R., 945.
Holden v. *N. Y. Bank*, 72 N. Y., 286.
Nevada Bank v. *Portland*, 59 F. R., 338.

ARGUMENT.

I.

THE FINDINGS OF THE ULTIMATE FACTS BY THE LOWER COURT CANNOT BE REVIEWED UPON APPEAL; THE FINDING OF THE LOWER COURT IS CONCLUSIVE.

Section 1011 of the Revised Statutes of the United States provides: "There shall be no reversal in the Supreme Court * * * for any error in fact."

Prior to the act of March 3, 1865, no decision by the court in the trial of a case at law, in which the jury had been waived, could be reviewed upon a writ of error, as to *any question* of fact or of law. By the provisions of that act, which have been embodied in Sections 649 and 700 of the Revised Statutes, the right of review is given in respect to rulings of the court in the progress of the trial of the case. And when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment. The finding of the court upon the facts has the same effect as the verdict of a jury. *Distilling & Cattle Feeding Co.* v. *Gottschalk*, 13 C. C. A., 618.

In *Norris* v. *Jackson*, 9 Wall., 125, at 127 the court said:

"Whether the finding be general or special, it shall have the same effect as the verdict of a jury, that is to say, it is conclusive as to the facts so found. In the case of a general verdict, which includes or may include, as it generally does, mixed questions of law and fact, it concludes both, except so far as they may be saved by some exception which the party has taken to the ruling of the court on the law."

12957

In *Martinton* v. *Fairbanks*, 112 U. S., 670, at 674 the court said:

"The plaintiff in error seeks to raise the question whether the evidence set out in the bill of exceptions justified the finding by the court, for the plaintiff of the issues of fact raised by the pleadings. This is, in defiance of the decision of this court, that it cannot be done, an attempt upon the general finding to bring up the whole testimony for review by a bill of exceptions."

In *Stanley* v. *Supervisors*, 121 U. S., 535, at 547 the court said:

"Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive here, it matters not how convincing the argument that upon the evidence the finding should have been different."

In *Hathaway* v. *Cambridge Nat. Bk.*, 134 U. S., 494, at 498 the court said:

"The first three assignments of error allege errors merely in the findings of fact by the court. These errors are not subject to revision by this court if there was any evidence upon which such findings could be made."

In *Runkle* v. *Burnham*, 153 U. S., 216, at 225 the court said:

"Findings of fact made by the court below are binding here, if there be any evidence to support them."

In *St. Louis* v. *Rutz*, 138 U. S., 226, at 241 the court said:

"We cannot review the action of the Circuit Court in finding the facts which it did find and in refusing to find the facts which it was asked to find and did not find."

The plaintiff in error in this case has, however, simply ignored the above rule, and is asking the court to review the evidence, which (contrary to correct principle) is set forth in the special finding of facts, and to hold therefrom that the lower court drew incorrect conclusions of fact from such evidence.

Counsel asks this court to hold that the lower court found erroneously when it found that Chaffee had no authority to execute the bill of sale. Counsel does not purport, nor does the special finding of facts purport, to set forth all the evidence upon which the lower court made its finding, but yet even in the absence of a complete transcript of the evidence in the case he asks this court to assume the function of the lower court and find the ultimate fact differently.

In his brief which relates to this topic, counsel cites three cases. Cases cited in this connection would naturally be expected to contain some authority for the proposition that where a jury has been waived in a United States Circuit Court, the court of review may reverse the findings of fact which the lower court made, but the cases which counsel cites are upon an entirely different point.

The case of *Lewis* v. *Hartford Silk Co.*, 56 Conn., 25, was a chancery suit to foreclose a mortgage, and in this suit, as an incidental proposition, the question was raised whether, as a matter of fact, the president and general manager and *unlimited financial agent* of this particular corporation did have the power to pledge the manufactured products of such company from time to time, in order to raise money to prosecute its business *as a going concern.*

That being a chancery suit, the Supreme Court of Connecticut reviewed the entire evidence *de novo* for the purpose of ascertaining whether the lower court had found the facts correctly, and after a review of all the evidence found as a fact that he did have this power. Of course a finding of fact as to what power *the Hartford Silk Company* once conferred upon *its* unlimited financial manager

12953

cannot possibly throw any light upon the power which *the Natchaug Silk Company* conferred upon *its* president. (In passing, it may be of interest to note that that case was widely different from our own. There the officer was the unlimited financial agent of the company, having full authority to borrow money, etc., and the question was, whether he had the power from time to time to pledge goods in order to borrow money *for the purpose of conducting the business of the company as a going concern*, which money the company took and used in its business. That was not a case where the president of the company exercised his election as to which creditors the company should prefer *in case of insolvency.*)

The case of *Hayden* v. *Dooley*, cited in this connection, was a chancery suit arising out of the attempted transfer by Chaffee to Dooley of goods in New York (hereinabove referred to) made on the 23rd of April, 1895. In that case it appeared that, subsequently to the supposed transfer, Dooley, believing that Chaffee had no power to make such a transfer, attached the very goods which Chaffee had transferred to him and of which Dooley had taken possession, and he afterwards assigned part of his claim to Pangburn, so that the latter might also proceed to get a judgment lien upon these goods. Other attaching creditors secured a *temporary* injunction against Dooley and Pangburn, from which order Dooley appealed. The upper courts said that the questions raised by the appeal were of a character which could not be determined upon affidavits, and affirmed the order. Incidentally Judge Shipman remarked that the decisions in Connecticut *apparently* recognized that the president and general manager of a corporation had such power as Chaffee exercised. He further said that the question as presented

was one of law and might be controlled by the facts which might subsequently appear at the hearing, as to any limitation of Chaffee's powers of which the bank had knowledge. This, of course, was a mere dictum in view of the point decided. If the learned judge had considered a decision necessary on this phase of the case he would, we think, have decided that corporations in Connecticut are no different from corporations of other states, and that no court has the right to declare, *as a matter of law*, that the general manager of a Connection corporation is vested with a certain power, unless, *as a matter of fact*, the corporation has given him that power (leaving out questions of estoppel). One company may give its manager such power and another may not; there is no law which requires such power to be given. The only case which was cited to Judge Shipman on this point was the case of *Lewis* v. *Hartford Silk Co.*, *supra* (we have examined the brief written on this appeal). The Lewis case, as we have seen, does not decide any such point, but simply decides that in that particular case, under the particular circumstances there arising, the president of the corporation did have such power.

In the case of *Scudder* v. *Anderson*, 54 Mich., 122, cited by counsel, the general agent of the mining company transferred about $1,800 worth of personal property belonging to the company, in payment of an indebtedness to a third person. More than a year afterwards an execution creditor of the company levied upon the property in question and there was a trial of the right of property. Presumably the trial was before a jury, and a verdict was found against the execution creditor. In the upper court the point was made that there was *not sufficient evidence* of the agent's authority to transfer this property. The court said:

12959

"Purchases and sales of personalty for use about mining premises must be of frequent occurrence, and would prosumably be under the control of the general manager. *The point was not strenuously pressed.* We think it was well taken."

A consideration, therefore, of the cases cited by plaintiff in error shows that they indicate no reason for a variation in this case from the inflexible rule that this court will not review the findings of fact of the court below for the purpose of deciding whether the lower court found the facts correctly or not.

II.

THE QUESTION AS TO WHETHER OR NOT THE PRESIDENT OF THIS CORPORATION HAD BEEN GIVEN POWER TO TRANSFER ITS ASSETS BY WAY OF PREFERENCE IN INSOLVENCY, IS A QUESTION OF FACT AND NOT A QUESTION OF LAW.

The lower court, in its finding of facts, inserted the following clause:

"He (Chaffee) had never had authority vested in him at any time by the company to make this transfer or to make similar transfers, *unless the facts hereinbefore and hereinafter stated, as a matter of law, conferred upon him such authority.*"

In view of the above language, it will probably be argued that the question as to whether or not Chaffee had the power is a question of law, and hence reviewable in this court. But it is submitted that such a position is untenable.

There is no law which absolutely fixes and determines the powers of the president or the general manager of a corporation. Such questions depend upon considerations of fact, and vary with each particular case. An individ-

ual by the mere fact of being elected president or manager of a company does not, as between himself and the company, acquire any power to do any act binding upon the company. Reference must be had to the acts of the company through its stockholders or through its directors in order to determine what power they have conferred upon the agent. One corporation may determine to confer upon the president the power to do anything which the company could do within the scope of its charter; another company may determine and enact that the president shall have no power to do anything in behalf of the company, and that every exercise of volition which is to result in a binding obligation of the company must be made by the board of directors; other corporations may determine and enact that the president shall have certain powers, provided his act is joined in by the secretary, etc. In order to determine in any given case what power the president has, an examination must be made of the facts and a conclusion of fact drawn therefrom. Suppose that on the first day of January a certain corporation receives its charter, and on the same day holds a meeting and elects a president, secretary and treasurer, but with no definition as to their powers and duties, and that thereafter no further corporate action of any kind or nature is taken, the history of the corporation during the succeeding ten days being one of entire inaction, a perfect blank. On the 10th day of January the president executes in the name of the corporation a deed conveying away all its property. If a judicial determination is necessary as to whether the president did or did not have the power to make this conveyance, would not the determination consist simply in finding that the company had never conferred any power upon the president,

12960

and that he, therefore, had no power to make this deed, and would not this determination be a mere determination of fact, and not a question of law at all? *The law* is that if no power is granted to the president to convey away the corporate property, then no act of his can pass the title. *The fact* to be determined is whether the corporation has ever given the president such power.

In our case the lower court having found, as a fact, that Chaffee did not have this power, such determination is binding upon this court.

III.

IF THE QUESTION AS TO CHAFFEE'S AUTHORITY IS A MIXED QUESTION OF LAW AND FACT, IT CANNOT BE REVIEWED BY THIS COURT.

We think it can hardly, under any circumstances, be claimed that the question as to whether or not Chaffee had the authority to make this transfer is a *pure* question of law. If it is not simply a question of fact, then it must be a mixed question of law and fact which this court will not review.

In *Norris* v. *Jackson*, 9 Wall., 125, which was a lawsuit submitted to the court by stipulation, in speaking of this kind of submission the court said:

"This is in perfect analogy to the findings by a jury, for which the court is, in such cases, substituted by the consent of the parties. * * * Whether the finding be general or special it shall have the same effect as the verdict of a jury, that is to say, it is conclusive as to the facts so found. In the case of a general verdict which includes or may include, as it generally does, *mixed questions of law and fact, it concludes both*, except so far as they may be saved by some exceptian which the party has taken to the ruling of the court upon the law."

In the case at bar it would have been perfectly proper for the court, under instructions, to have submitted to the jury for a special finding the question whether or not this corporation had ever conferred upon Chaffee the power to make this transfer. If the jury had made a special finding that the corporation had never conferred this power upon the president it would be conclusive upon this court, even though such finding might involve a mixed question of law and fact. If such a finding by a jury would be conclusive, then, a similar finding by the court on a submitted case is equally conclusive, for the findings of a court in such a case stand on exactly the same footing as the verdict of a jury.

A perfect analogy to aid us in determining whether the upper court will, in a case of this kind, review a mixed question of law and fact, may be derived from the decision of cases arising under section 693 of the Revised Statutes, which provides that any final judgment in any civil suit which was tried before two judges at circuit, wherein the said judges certify that their opinions were opposed upon any question which occurred on the trial, may be reviewed by the Supreme Court.

Under this statute it has been held that the court will not review mixed questions of law and fact.

In *Dennistoun* v. *Stewart*, 18 How., 565, the court below certified that they were divided in opinion upon the following question:

Whether the firm of Dennistoun, Wood & Co., of New York, or the plaintiffs were bound to hold the said bill of lading for the shipment on the said Windsor Castle as a security for the bill of exchange described in the declaration, and whether any amount of loss arising to the said

12961

defendant from their failure to hold the said bill for the purpose of securing the proceeds of the cotton specified therein, for the payment of the bill of exchange described in the declaration, can be used as a defense against the bill, or any part thereof.

The Supreme Court decided that it would not review the question there certified, saying:

"Upon the trial in the Circuit Court the examination of witnesses was introduced and relied on, both by plaintiffs and defendants, to show the nature of the agreement upon which the cargo of the Windsor Castle was purchased, and upon which the plaintiffs consented to purchase, and did purchase, the bills drawn by the defendant upon Booth; the character of the security proffered and said to have been accepted in the bill of lading for the indemnity of the plaintiffs in purchasing the bills drawn upon Booth, and the obligation of the same plaintiffs not to surrender that security, nor to use it to the detriment of the defendant. The case was not placed before the judges upon any general or settled principle of the law merchant, nor was their opposition in opinion founded upon a case moulded and governed simply by that law, but they have divided upon a case *which was or might have been affected by facts heard in evidence*, the influence of which facts, as controlling the acts and obligations of the parties, fell peculiarly and properly within the province of the jury."

In *Jewell* v. *Knight*, 123 U. S., 426, the court said:

"The points certified must be questions of law only, and not questions of fact or of mixed law and fact, not such as involve or imply conclusions of judgment by the court upon the weight or effect of testimony of facts adduced in the cause. * * * The question of fraud or no fraud is one necessarily compounded of fact and of law. * * * The main issue in the case upon which its decision must turn, and which the certificate attempts in various forms to refer to the determination of this court, is whether the sale of goods was fraudulent as against the plaintiffs. That is not a

pure question of law, but a question either of fact or of mixed law and fact. * * * As was recently said by this court, speaking of questions certified in similar form: 'They are mixed propositions of law and fact, in regard to which the court cannot know precisely where the division of opinion arose on a question of law alone'; and 'it is very clear that the whole case has been sent here for us to decide, with the aid of a few suggestions from the circuit judges of the difficulties they have found in doing so.'"

Waterville v. *Van Slyke*, 116 U. S., 699, 704.

In *Smith* v. *Craft*, 123 U. S., 436, which was a similar case, the court said:

"The question of fraud or no fraud involved a question of fact, which, if this case had been on the common law side of the court, and either party had desired it, must have been submitted to a jury."

In *Fire Ins. Co.* v. *Wickham*, 128 U. S., 426, the court said:

"The second question certified is clearly obnoxious to the second and third rules; it asks us to decide whether, upon all the evidence in the case, the defendant was entitled to a verdict. This would require us to decide upon the weight of the evidence and the conclusions to be drawn from the facts."

We think the considerations presented under this and the preceding heading amply illustrate the principle we contend for, *i. e.*, wherever the decision of a question requires the court to consider the evidence and to weigh one fact against another in its determination, then the question must be a question of fact, or a mixed question of law and fact; and in neither of these cases will the upper court review the finding of the court below.

In our case the finding that Chaffee had no power to

12962

make this transfer necessarily involves a consideration of and a weighing of the various facts in evidence, and hence is not reviewable here.

IV.

WHETHER THE FINDING AS TO CHAFFEE'S AUTHORITY BE A CONCLUSION OF FACT OR A CONCLUSION OF LAW, THE CONCLUSION MUST BE THAT HE DID NOT HAVE SUCH AUTHORITY.

Assuming that we are wrong in our arguments under the two preceding headings, and that the question at issue is a question of *pure law* (although it involves a consideration of all the evidence in the case and a weighing of one fact against another), we now proceed to argue that the lower court reached a correct legal conclusion on the point. A vital distinction which we desire to impress upon the court is, that although Chaffee may have had the power to do any ordinary act in conducting the affairs of this corporation *as a going concern* for the profit of its stockholders, such as acts looking towards the proper manufacture of the goods and their proper sale and distribution, still he did not have the power to put an end to it as a going concern and convey away its assets.

When a corporation is organized and its owners are framing the rules for its conduct and laying out the duties of its servants they do not usually anticipate insolvency. It is not customary for a company at the beginning to lay out a scheme by which it shall be wound up in case of disaster. The stockholders usually look forward to a prosperous business career, and all acts done by them have that object in view. When a general manager is appointed it is for the purpose of having him do those

acts which the daily routine of business requires to be done. He is not selected with a view to his fitness to administer the corporate assets in insolvency.

An engineer is employed *to run* his engine; not to sell or dispose of it. A manager is employed to *manage* the business; not to stop it, and convey away all the assets.

If disaster overtakes a corporation it would naturally be supposed that *the owners* of the property would prefer to decide which of *their* friends should be favored by a preference. It would not be supposed that the owners would be willing that one of their *servants* should convey away *their* property to favor one of *his* friends.

When the manager has brought the corporation to a condition of insolvency it is time to relieve him from further service. The owners would then naturally desire to step in and decide how to wind it up, and how to distribute its assets. This was not the purpose for which they employed the manager. It would to them seem simply an impertinence for the manager to attempt to dispose of their property to favor his own friends.

Bearing these general considerations in mind, let us see what powers this corporation bestowed upon Chaffee.

The charter of the company provided that the stock, property and affairs of said corporation *should be managed by its directors.* If this positive statute had any meaning, it must have meant that any act requiring volition or the exercise of discretion in any manner outside of the usual routine of business must be done by the board of directors.

This statute was a positive prohibition against conferring upon Chaffee the power to decide when the corporate business should stop, and to whom its assets should be conveyed by way of preference.

The president of the corporation seems to have had no power, except to preside at meetings. (The general management of the company was entrusted to the general manager.) The by-laws provided that "the president shall preside at all meetings; * * * he shall also perform all duties especially required of him by the laws of this state; but his charge of the executive business of the company shall be subject to the control of the directors."

This by-law was not a grant of power. It did not confer upon the president charge of the executive business. But it did impose a limitation upon the directors which would *prevent* them from giving the president any charge of the executive business, except subject to their approval.

Observe also the words "executive business." An act of volition is not executive business.

These are all the facts which throw any light upon the duties and powers of *the president*. It is quite plain from the foregoing that no power was conferred upon *him* to convey away the assets of the company by way of preference in insolvency.

The by-laws also provided for the annual election of a general manager "who shall have entire charge of the business and affairs of said company, subject to the order and approval of the board of directors."

It must be borne in mind in connection with this by-law that Chaffee had nothing whatever to do with the financial management of the company; that is, with the borrowing of money, and with the arrangements for securing its creditors, etc. All this part of the management of the company was done by Risley down to the

day of his death, which was a few days before the dissolution of the company.

All the negotiations with this bank and all arrangements made with them in regard to the borrowing of money and giving of the security were conducted by Risley.

Chaffee's duties consisted exclusively in looking after the manufacture of the goods and their distribution to the various branch houses.

The foregoing constitute all the acts of the company by which any grant of power was made to Chaffee as *general manager*.

Can it for a moment be contended that a by-law conferring upon a general manager entire charge of the business of the company could be construed to be a grant of power to the manager, in case insolvency should overtake the corporation, to convey away all the assets to one of his friends? It certainly would be a remarkable stretch of construction to say that a by-law adopted at the beginning for the guidance of the company made the general manager all during the existence of the company the repository of the power to determine in case of dissolution which creditor should be preferred.

It seems perfectly plain that the scope of this by-law was simply to confer the power to do those things in the management of the affairs of the company which the daily routine of its business as a going concern demanded.

It must be borne in mind that the distribution of the assets in insolvency is not a *general* duty. It is a unique and special function which in the nature of things can only be performed once in the history of any corporation.

These being then the only *grants of power* to Chaffee, what did Chaffee *do?*

The facts as found by the court are, that Chaffee—

"Had had entire charge of the current business and affairs of said corporation *as a going concern*, and within the fields of its activities *as a going concern*, and had been permitted by his board of directors to manage, as he saw fit, the current business and affairs except that Risley had charge of the financial affairs of the company and of the borrowing of money, and except that Chaffee consulted the board of directors when any act out of the usual routine of business was to be done, such as hiring an extra office and insuring the accounts of the company, in purchasing or mortgaging real estate and in determining the policy of the company in times of strikes." (Rec., p. 11, Par. 7.)

"He had never made a transfer similar to this. He had never, during the business career of the company, done any act on behalf of the company that would lead the bank or anyone else to suppose that he had been given the power by the company to dispose of its assets by way of preference in case of impending dissolution." (Rec., p. 15; Par. 18–21.)

The bank knew and Dooley knew that this was an attempted preference on Chaffee's part in contemplation of the insolvency and liquidation of the company. (Rec., p. 15; Par. 19.)

Thus we find from the review of the facts connected with this case that this corporation was expressly prohibited by statute from conferring upon any individual the power which Chaffee exercised in this case.

We find that the company never, in fact, conferred upon him any such power, but simply gave him the power to manage his daily routine of the business as a going concern.

We find as a matter of fact that he never had anything to do with this part of the business of the company—that is, with the arrangements for borrowing money and securing it; and we find, in fact, that he never did any act similar to this.

T[illegible] conclusions seem to make it absolutely impossible [illegible] hold that Chaffee had the power to make this preference. If the corporation never conferred this power upon him, then the bill of sale which he executed would have no more effect in transferring the title to the goods than would a bill of sale of the same goods executed by the writer of this brief.

The principles which we are here insisting on are illustrated by the following cases:

In *First Nat. Bk.* v. *Co.*, 116 N. C., 827, one Avery was the treasurer of the company and had practically the entire charge of the management of its business. He sold all the furniture manufactured at the works of the company and used the proceeds of sale for the benefit of the company in carrying on its general business. He was to stay at Asheville to run the business. From the formation of the company he had charge of it, managed it, sold its furniture, borrowed money for it and paid its debts. This he had done for two years. He managed all the affairs of the company.

The company, being pushed by one of its creditors, he transferred the entire stock of manufactured goods then on hand at the Asheville branch in payment of the indebtedness of a certain creditor.

The court said:

"We think that the agent Avery transcended his powers as claimed for himself by his own testimony when he attempted to make such a disposition of the property of the corporation as this transaction discloses, and therefore that no title to the property passed to the intervenors in the attempted sale. Avery claimed, and the testimony shows, that he had very large powers in the *active* management for which the company was organized, the manufacture and sale of furniture, but we cannot find from a

12965

reading of the whole testimony that the company ever entrusted him with the power to do what he attempted to do in the transaction above set forth. His agency concerned the *running* and *continuation* of the business. *By his act he practically put an end to it.* Under his powers he was to sell the product of the defendant manufacturing company, purchase material for its use, borrow money and pay its debts. He was not authorized to take the entire stock of furniture and also a large quantity of lumber, agree upon a value for it with certain of the creditors of the corporation, turn the property over to them and have the value placed upon its indebtedness, some of which was not due as a credit, which thing he did. * * * However broad may be the general power of an agent to conduct the business of a manufacturing corporat on, it cannot, in reason, be extended to cover such a transaction as the one which the agent in this matter attempted to perform."

In *Norton* v. *Alabama Nat. Bk.*, 14 Southern, 872, the president of a grocery company was one L. B. Jordan. His wife was secretary of the company and also a director, and his brother was a director. These three persons were the sole corporators and stockholders. The evidence showed that L. B. Jordan told his wife, who was secretary and a director, that unless he could borrow money on that day he would be compelled to make an assignment, and she replied, "Do the best you can." The other director was absent from the city. During that day, the president of the company executed, in the name of the company, a general assignment for the benefit of its creditors. *Held*, that the president of the company had no authority to make this transfer and that title did not pass thereunder. The court said:

"It is a generally recognized principle of law that the president of a corporation, or its general manager, without authority of its board of directors, cannot make a valid conveyance or assignment of the property of the corporation."

(It will be noted that in this case the conveyance was made for the benefit of all the creditors ratably. If the president had no power to make such a conveyance, *a fortiori*, he would have no power to make a conveyance as a preference to one individual creditor.)

In *England* v. *Dearborn*, 141 Mass., 590, one William H. England owned ninety-eight shares of the stock of a manufacturing corporation; his wife owned one share, and one Whitman owned the only remaining share. Thus England owned practically all the stock. He and Whitman were the only directors. England was president and general manager of the company England executed, in the name of the company, a mortgage of all its property to secure a creditor, and it was held that he had no such power. The court said:

"There is nothing in this case from which previous authority or subsequent ratification can be inferred, except the fact that William H. England was made president, treasurer and general manager of the corporation. Authority to sell or mortgage all the property of a corporation, except its book accounts, *cannot be one of the ordinary incidents of carrying on the business* of a manufacturing corporation. The extent of the judicial knowledge which courts have taken of the customary powers of different officers of corporations need not be discussed, for it cannot be held to be within the implied powers of any officer of a manufacturing corporation to convey away all its property, except in book accounts."

In *State National Bank* v. *Moran Packing Co.*, 68 Ill. App., 25, the president and secretary of the company had executed a mortgage of all the corporate property to secure one creditor. The court said:

" In this state it has long been the rule that the president of a corporation is presumed to have authority to transact for the corporation business of *an ordinary nat-*

12966

ure, arising in the routine of affairs, such as custom or necessity has imposed upon the office.

* * * * *

We are of the opinion that the president and secretary of such a company as was this have not, by mere virtue of their offices, authority to transfer substantially all the property of the corporation to certain creditors by way of preference to them, and that the company was not bound by and might avoid such conveyances.

The transaction was not one within the ordinary or usual course of the business of the company; neither was it such as custom has sanctioned, or the ordinary carrying on of business made necessary. *Winsor* v. *Bank*, 18 Mo. App., 665; *Hyde* v. *Larkin*, 35 Mo. App., 366; *McKeag* v. *Collins*, 87 Mo., 164; *Hoyt* v. *Thompson*, 5 N. Y. (1st Selden), 320; *Bank* v. *Asheville Furniture Co.*, 116 N. C., 827; *Coke* v. *National Association*, 35 Ill. App., 465."

The precise question under consideration was determined in the Supreme Court of Maryland, *Hadden* v. *Linville*, 38 At. Rep., 37, where the validity of Chaffee's transfer to Dooley of the goods in Baltimore was brought in question. That case arose, as this does, on a contest between the attaching creditors and Dooley. In that case, in speaking of Chaffee, the court said:

"On the 22d April, he proceeded to New York and transferred all the company's goods, including those he had sent there the week before, to the bank on account of his company's indebtedness to the latter; thence he went to Chicago and Baltimore, and at each place made a transfer of all the goods held there—thus placing all the property of the company outside of the State of Connecticut (so far as the record discloses) in the hands of the bank. It is obvious such transfers were not made in the usual course of business, but solely for the purpose of devoting all the assets within his control (a receiver having been appointed for the company in Connecticut on the 26th of April) to the discharge of the antecedent claim of the bank; thus constituting, of his own will, the bank

a preference creditor of his insolvent company. The twelfth by-law of the company provides for the election of a general manager, 'who shall have entire charge of the business and affairs of said company, subject to the order and approval of the board of directors.' This by-law, by a reasonable construction, confers full power to do all things and make all contracts that are needed in transacting *the ordinary business of the corporation* within the legitimate scope, objects and purposes of its organization; *but not such authority as that he may deal at his own pleasure with the assets outside the regular course of business.* Nor does it appear from anything contained in the record that Chaffee had ever arrogated to himself such extensive authority. Prior to the transaction in question he had never undertaken to dispose of the property of the company, otherwise than in the regular course of business. This case is clearly distinguishable from one where the managing officer had disposed of the property for the purpose of procuring credit for his company; there are cases where that is held to have been a proper exercise of his authority; *Fay* v. *Noble*, 12 Cushing, 1; *Lewis* v. *Hartford Silk Co.*, 56 Conn., 36; but with that question we are not now called upon to deal. In this case the transfer was for the purpose of securing or paying an antecedent debt. Chaffee's authority under the by-law, and under that he was permitted to exercise in the management of the affairs of the company, was conferred upon him for the purpose of enabling him to properly and successfully conduct the business, to keep the company a going concern, with capacity to earn a profit for its stockholders; not that he might, after the company became insolvent and was about to go into the hands of a receiver, parcel out its assets or any portion of them among such of the creditors as his caprice or interest might lead him to select. An authority like this has never been accorded, as far as we are informed, to any officer charged with the conduct of the affairs of the corporation, whether he be called president, general manager, or by any other name, unless there had been conferred upon him a prior express authority by the directors or stockholders of the company."

12967

We have cited above sufficient cases amply to illustrate the rule which we contend for as being applicable to this case. Mere multiplication of authorities is useless. If the principle does not commend itself to the judgment of this court, additional authorities would have no value. We think the foregoing consideration and authorities, however, make it quite plain that Chaffee had no power to make the transfer in question, and that no title passed under the bill of sale.

But it is claimed that the cases of *Lewis* v. *Co.*, 56 Conn., 25; *Hadden* v. *Dooley*, 74 F. R., 429, and *Scudder* v. *Anderson*, 54 Mich., 122, are contrary to our position.

In the Lewis case the question was raised whether, as a matter of fact, the president and general manager and *unlimited financial agent* of this particular corporation did have the power to pledge the manufactured products of such company from time to time, in order to raise money to prosecute its business *as a going concern.*

The question there presented was widely different from the question presented here. There the officer was the *unlimited financial agent* of the company, having full authority to borrow money, etc., and the question was, whether he had the power from time to time to pledge goods in order to borrow money to use in the ordinary course of business. That was not a case where the president of the company exercised his election as to which creditors the company should prefer in case of insolvency.

The case of *Hadden* v. *Dooley*, cited in this connection, was a chancery suit arising out of the attempted transfer by Chaffee to Dooley of goods in New York (hereinabove

referred to), made on the 23rd of April, 1895. In that case it appears that subsequently to the supposed transfer Dooley, believing that Chaffee had no power to make such a transfer, attached the very goods which Chaffee had transferred to him and of which Dooley had taken possession, and he afterwards assigned part of his claim to Pangburn, so that the latter might also proceed to get a judgment lien upon these goods. Other attaching creditors secured a *temporary* injunction against Dooley and Pangburn, from which order Dooley appealed. The upper court said that the questions raised by the appeal were of a character which could not be determined upon affidavits, and affirmed the order. Incidentally Judge Shipman remarked that the decisions in Conneticut *apparently* recognized that the president and general manager of a corporation had such power as Chaffee exercised. He further said that the question as presented was one of law and might be controlled by the facts which might subsequently appear at the hearing, as to any limitation of Chaffee's powers of which the bank had knowledge. This, of course, was a mere dictum in view of the point decided. If the learned judge had considered a decision necessary on this phase of the case he would, we think, doubtless have decided that corporations in Connecticut are no different from corporations of other states, and that no court has the right to declare, *as a matter of law*, that the general manager of a Conneticut corporation is vested with a certain power, unless, *as a matter of fact*, the corporation has given him that power (leaving out questions of estoppel). One company may give its manager such power and another may not; there is no law which requires such power to be given. The only case which was cited by Judge Shipman on this point was the

12963

case of *Lewis* v. *Hartford Silk Co.*, *supra* (we have examined the brief written on this appeal). The Lewis case, as we have seen, does not decide any such point, but simply decides that in that particular case, under the particular circumstances there arising, the president of the corporation did have such power.

In the case of *Scudder* v. *Anderson*, 54 Mich., 122, cited by counsel, the general agent of the mining company transferred about $1,800 worth of personal property belonging to the company, in payment of an indebtedness to a third person. More than a year afterwards an execution creditor of the company levied upon the property in question and there was a trial of the right of property. Presumably the trial was before a jury and a verdict was found against the execution creditor. In the upper court the point was made that there was *not sufficient evidence* of the agent's authority to transfer this property. The court said:

"Purchases and sales of personalty for use about mining premises must be of frequent occurrence, and would presumably be under the control of the general manager. *The point was not strenuously pressed.* We think it was well taken."

These cases, therefore, when closely examined, are found not to be any authority against the proposition we contend for.

V.

THE ILLINOIS LAW IS THAT A BILL OF SALE WHERE THERE IS NO OPEN AND NOTORIOUS CHANGE OF POSSESSION UNDER IT IS FRAUDULENT AND VOID. THE UNITED STATES COURTS FOLLOW THE POLICY OF THE STATE LAW IN CASES OF THIS KIND.

It was in an early case decided by the United States Supreme Court that a transfer of chattels without a change of possession was fraudulent *per se* (*Hamilton* v. *Russell*, 1 Cranch, 309). In a later case (*Warner* v. *Norton*, 20 Howard, 448) the court gave some consideration to that point and rather indicated that they thought the best rule was that a want of change of possession was not fraud *per se*. But they expressly refrained from overruling *Hamilton* v. *Russell*, saying: "The case before us is not similar to that of *Hamilton* v. *Russell*." The Warner case was decided upon the ground that there was evidence tending to show a change of possession, and the verdict of the jury on that subject could not be overturned. A careful reading of this case will show that it is not a clear-cut decision to the effect that an absence of change of possession is merely *prima facie* evidence of fraud.

But whatever may be said as to what was decided in *Warner* v. *Norton* (decided in 1867) there is no doubt but that the Supreme Court has since that time clearly laid down the rule that the United States courts will follow the policy of the state in cases of this kind. And if such policy is to the effect that a transfer of personal property without change of possession is fraudulent *per se*, that rule will be applied in cases coming from that state, no

1296

matter what rule might be applied in cases coming from other states.

In *Green* v. *Van Buskirk*, 7 Wall., 139, there was a controversy between a mortgagee who had not taken possession and a subsequent attaching creditor. The court said:

"The policy of the law in Illinois will not permit the owner of personal property to sell it and still continue in possession of it. * * * It is clear that if Van Buskirk had selected Illinois instead of New York to test the liability of these safes to seizure and condemnation on the same evidence and pleadings, their seizure and condemnation (under attachment proceedings) would have been justified. * * * And as the effect of the levy, judgment and sale is to protect Green, if sued in the courts of Illinois, and these proceedings are produced for his own justification, it ought to require no argument to show that when sued in court of another state for the same transaction and he justifies in the same manner that he is also protected. Any other rule would destroy all safety in derivative titles and deny to a state the power to regulate its personal property within its limits."

In *Hervey* v. *Locomotive Works*, 93 U. S., 664, the court held that "the policy of the law in Illinois will not permit the owner of personal property to sell it either absolutely or conditionally and still continue in possession of it," * * * and the property "while in possession of C. & Co., who exercised complete ownership over it, was seized and sold in the local courts of Illinois as their property. These proceedings were valid in the jurisdiction where they took place and must be respected by the Federal tribunals."

"The Rhode Island Locomotive works took the risk of losing its lien in case the property while in the possession of C. & Co. should be levied on by their creditors, and it cannot complain, as the laws of Illinois pointed out a way to preserve and perfect its lien."

In *Harkness* v. *Russell*, 118 U. S., 663, a case arose from Utah involving the question as to whether a want of change of possession was fraudulent *per se* or whether it was merely *prima facie* fraud. The court discussed this subject at great length and decided that in this case coming from Utah such a state of affairs was not fraudulent *per se*. The court referred to the Green case and the Hervey case as determining the general principles that the policy of Illinois will not permit the owner of personal property to sell it and still remain in possession of it, and said that the Hervey case merely decided: First, that that case was to be governed by the law of Illinois, the place where the property was situated; and, second, that by the law of Illinois such transactions were void.

See, also, *Pullman* v. *Co.*, 141 U. S., at page 22.

As plaintiff in error does not deny that the law of Illinois is that a lack of change of possession renders a bill of sale void, no further argument need be made on this point.

VI.

THE FINDING OF THE LOWER COURT THAT THERE WAS NO OPEN, VISIBLE OR NOTORIOUS CHANGE OF POSSESSION IS NOT REVIEWABLE IN THIS COURT.

The court below found:

"There was no change in the title to or possessions of said goods which was visible, open or notorious, down to the date of the attachment, unless the facts hereinafter and hereinbefore specifically stated did, as a matter of law, constitute a visible, open and notorious change of possession."

The question as to whether or not the change of pos-

12970

session was visible, open or notorious is a question of fact, and hence is not reviewable here.

If however the court should not agree with us in treating this finding as one of fact and if the court should be of opinion that it is a finding of law, then we suggest the following considerations.

VII.

THE COURT WAS RIGHT IN FINDING THAT THERE WAS NO VISIBLE, OPEN AND NOTORIOUS CHANGE OF POSSESSION.

The rule requiring a visible change of possession was not made for the protection of either the grantor or the grantee; they can take care of themselves. But this rule was made for the protection *of the public.* The policy of Illinois, figuratively speaking, requires that there should be *three parties* to every transfer of personal property in this state. These parties are, 1st, the grantor, 2d, the grantee, and, 3d, the public. The third party is required to be notified of the transaction for its own protection.

In this case the third party was entirely omitted from the transaction, and its rights were ignored. Hence, the transaction is void. In considering what was done here it will be seen that every step taken was taken for the benefit of the second party. The steps which should have been taken for the benefit of the third party, the public, were not only omitted, but they were *purposely omitted.*

A bill of sale was made out and delivered to an attorney for the grantee. The grantee then theoretically took possession of the goods and theoretically redelivered the goods to Stanton and took his receipt.

Then a new set of books was opened. These were all acts that took place within a private office. The public knew nothing about them. They were all acts done for the protection of the grantee against the grantor. Nothing was done for the protection of the public. Wherever the public might come in contact with the transaction it was *purposely hidden*. No member of the public who entered the store was informed either by the signs (inside or out) or by word of mouth that any change had been made. The salesmen, who knew of the transfer, were instructed to keep it secret from the public, and in fact sold the goods as the goods of the Silk Company, and orders kept coming in up to the time of the attachment, addressed to the Silk Company, procured at the solicitation of salesmen on the road.

The same employes, exactly, remained in the store selling goods over the counter as though nothing had happened. The same office fixtures were used, including the safe. None of these fixtures had ever been transferred to Dooley. All the new books and papers were put every night in the safe, which still belonged to the Silk Company and had its name painted on it in large letters.

When goods were shipped to customers in filling orders which had come in addressed to the Silk Company bills were sent in the name of Stanton as agent for Dooley. This was done entirely for the protection of the grantee, to prevent remittances being made to the grantor. It was not done for the benefit of the public. These bills were not public notices. They did not purport to notify anyone of anything. They did not inform anybody that that stock of goods had been transferred to anyone. They simply informed the recipient that an order which had been sent to Chicago to the Silk Company had been

1297

appropriated and filled by another person, leaving the recipient to guess why this was done. We cannot think that the policy of the law which requires notice to the public for the protection of the public will be satisfied by this transaction, which was carried through with the admitted purpose of deceiving the public. To show the policy of the law and to illustrate the fact that the rule exists for the benefit of the public, the following cases may be cited:

In *Martin* v. *Duncan*, 156 Ill., 274, the agent of the former owner remained in the store selling the goods, and although, as between the parties, everything was done to make the transfer valid, the books were properly kept, etc., still the court held the change in possession was not sufficiently obvious to protect the public. The court said:

"Up to May 16th, Robert had been in possession as agent for his brother, and if on May 28th he was in possession for himself the change in the character of possession should have been indicated by such outward, open, actual and visible signs as could be seen and known to the public or persons dealing with the goods. * * * When the known and previously recognized agent of an alleged vendor remains in possession the appearance to the world is the same as though the vendor himself remained in possession unless there are substantial and visible signs of a change of title."

In *Wright* v. *McCormick*, 67 Mo., 426, the signs were not changed, although as between the parties the transfer was good. The same clerks remained in charge. The court said the facts were "insufficient to notify the community at large, or the regular customers even, that there had been a change of possession. The retention of the sign amounted to a declaration to the public that Doherty was still the proprietor."

In *Mead* v. *Noyes*, 44 Conn., 487, where there had

been a transfer ample as between the parties, but where the vendee allowed the vendor to exercise certain acts of ownership, the court held the conveyance void, saying:

"Who would a stranger have considered in possession in this case, he would have seen, etc. * * * We are unable to discover anything which would lead a stranger to the sale to suppose there had been a change in possession and ownership of the property."

In *Kirtland* v. *Snow*, 20 Conn., 23, the court say:

"This court has repeatedly said that the rule of law which requires the vendee of personal property to take and retain the possession of it, in order to protect it from the vendor's creditors, is a rule of policy as well as of evidence, its object being to prevent fraud by taking away the temptation to commit it. * * * The rule is founded upon the presumption that a purchaser will naturally perfect his purchase by taking possession. The enjoyment of the thing purchased is generally, if not always, the object the purchaser has in view; and his neglect to take possession is, therefore, so unusual and contrary to general experience as to be very strong evidence that the purchase was only colorable and not real. And the reason of extending it from a mere rule of evidence, calling it a badge of fraud only, and arbitrarily declaring, as a matter of law, that it renders the sale void as to creditors, notwithstanding the highest evidence of the honesty of the sale, is, because it has been thought better to take away the temptation to practice fraud, than to incur the danger arising from the facility with which testimony may be manufactured to show that a sale was honest."

In *Norton* v. *Doolittle*, 32 Conn., 405, the court said:

"The rule of law which requires a change of possession is one of policy. Its object is the prevention of fraud. * * * The policy which dictates it, and the prevention at which it aims, require its rigid application to every case where there has not been an actual, visible and continued change of possession. * * * And, as in applying the rule we must look beyond the good faith, or the secret, technical features of the transaction, so purchasers must

12972

learn and understand that if they purchase property, and without legal excuse permit the possession to remain, in fact, or apparently or visibly, the same, or if changed for a brief period, to be in fact or apparently and visibly restored and thereafter in fact or apparently and visibly continued as before the sale, they hazard its loss by attachment for the debt of the vendor, as still, to the view of the world and in the eye of the law, as it looks to the rights of creditors and the prevention of fraud, his property."

It is needless to quote from other cases. The policy of the law is, however, amply shown also in the following cases:

Fitzgerald v. *Gorham*, 4 Cal., 289.
Claflin v. *Roseberg*, 42 Mo., 439.
Mills v. *Thompson*, 72 Mo., 367.
Stewart v. *Nelson*, 79 Mo., 524.
Stephens v. [illegible], 15 Cal., 503.
Ticknor v. *McGrellis*, 84 Ill., at 474.
Gillett v. *Stoddard*, 30 Ill. App., 231.

The case of *Warner* v. *Norton*, *supra*, cannot be taken to be any authority in this case on the question of change of possession, because the law as apparently indicated by the decision in that case has been changed by the later cases cited. And on the question of fact as to whether or not there has been a change of possession, that question was settled in that case by the verdict of the jury. The finding of the jury in *that case* that there *had* been a change of possession has no weight in this court at this time in determining whether there has been a change of possession in *this case*.

These considerations and authorities show that the lower court found correctly on this issue.

VIII.

AN ABSOLUTE BILL OF SALE INTENDED AS A MORTGAGE IS FRAUDULENT PER SE.

The bill of sale was given as security. No part of the debt was canceled. In the claim filed by Dooley against the Silk Company, no allowance was made on the indebtedness by reason of the Chicago transfer. It was intended as a mortgage and hence is void *per se.*

Beidler v. *Crane*, 135 Ill., 92.
Watkins v. *Arms*, 64 N. H., 99.
First Nat. Bank v. *Co.* 43 Mo. App., 561.
Campbell v. *Davis*, 85 Ala., 56,
Sims v. *Gaines*, 64 Ala., 392.
Winkley v. *Hill*, 9 N. H., 31.
Halcome v. *Ray*, 1 Ired., 340.
Friedley v. *Hamilton*, 17 S. & R., 70.

IX.

THE BANK AND DOOLEY ARE ESTOPPED FROM ASSERTING THE CLAIM OF THE BANK IN ANY FORM TO THE PREJUDICE OF THE PERSONS WHO WERE DECEIVED BY THE BANK'S FRAUDULENT STATEMENTS.

It has been found as a fact in this case that the cashier of the bank made up false statements regarding the condition of the Silk Company for the purpose of deceiving the attaching creditors, and that by means of these fraudulent statements raw silk was gotten from these attaching creditors upon credit, which credit they would not have given unless deceived by such statements, and that the

12973

entire amount of the claims upon which the attachments were sued out was for the raw silk furnished on the faith of these fraudulent statements.

The statements were fraudulent and false in that Risley knew the indebtedness of the bank, and knew that this large indebtedness rendered the Silk Company insolvent; but in the statements he falsely and fraudulently concealed this fact. The statements represented that the Silk Company was $200,000 better off than it really was.

The bank concealed the insolvency of the company and concealed the fact that its own large claim rendered the *company insolvent*, for the purpose of deceiving these creditors. In *Blennerhassett* v. *Sherman*, 105 U. S., 100, the court held:

"Where a mortgagee, knowing that his mortgagor is insolvent, for the purpose of giving him a fictitious credit, actively conceals the mortgage which covers his entire estate and withholds it from the record, and, while concealing it represents the mortgagor as having a large estate and unlimited credit, and by these means others are induced to give him credit, and he fails, and is unable to pay the debts thus contracted, the mortgage will be declared fraudulent and void at common law, whether the motive of the mortgagee be gain to himself or advantage to his mortgagor."

We will simply refer to the following cases as sustaining our proposition, and showing that the bank and Dooley are bound by the fraudulent acts of the bank's officers, and are now estopped to assert their claim:

Bacon v. *Harris*, 62 F. R., 99.
Goll v. *Miller*, 54 N. W., 443.
Butler v. *Cockerill*, 73 F. R., 945.
Holden v. *N. Y. Bank*, 72 N. Y., 286.
Nevada Bank v. *Portland*, 59 F. R., 338.

X.

THERE WAS NOT AND COULD NOT HAVE BEEN ANY RATIFICATION OF CHAFFEE'S ACT IN MAKING THIS TRANSFER.

The bill of sale to Dooley was made on April 25. No attempt was made to take possession until the 26th, but by that time a receiver had been appointed by a court of competent jurisdiction in Connecticut "of all the property, estate and rights of said Natchaug Silk Company." (Rec., p. 17; Par. 13.) All functions of the board of directors, so far as they could affect the property of this corporation, were suspended by the appointment of this receiver. Three days after the appointment of the Connecticut receiver, when Chaffee had returned to Willimantic, he, together with Lucas, Dooley's attorney, applied to the directors and asked them to ratify the transaction, "but said directors declined to take any action whatever in regard thereto." (Rec., p. 19; Par. 32.) It certainly cannot be claimed that the directors ratified this act by an express refusal to do so.

Of course the receiver could not ratify such act, because that would be directly opposed to his duties in the premises. The duty of the receiver was to gather in all the assets and protect all the rights of the corporation for the benefit of all creditors equally. If the receiver was vested with the right to disaffirm Chaffee's act and thus resume title to the goods, he certainly would have no power to waive the right in favor of any one individual creditor and to the detriment of the general creditors in whose interest he was appointed.

12974

XI.

IF THE BILL OF SALE DID NOT CONFER A TITLE UPON DOOLEY, THE TITLE STILL REMAINS IN THE CORPORATION, AND CREDITORS OF THE CORPORATION HAVE A RIGHT TO ATTACH.

It is claimed by plaintiff in error that even if the bill of sale did not confer title on Dooley no advantage of this fact could be taken by attaching creditors. He cites as authority for this proposition four Pennsylvania cases, which upon examination are found not to deal with the point at all.

Drexel's Appeal, 6 Pa. St., 272, was a case where a judgment had been irregularly entered, and a motion was made by a stranger to the record to vacate the judgment. The court held that a stranger to the record had no standing to move to vacate the judgment. If the defendant was willing to submit to it, nobody else could complain.

In the case of *Gordon* v. *Preston*, 1 Watts, 385, it was held that a mortgage originally invalid was ratified by the subsequent action of the company.

In *Hauer's Appeal*, 5 W. & S., 473, it was held that even though a judgment had been irregularly entered against an individual on a warrant of attorney, still a stranger to the record could not maintain a motion to set it aside.

In *Johnson* v. *Miller*, 174 Pa. St., 605, a subsequent attaching creditor attacked the validity of a sale of some of the corporate property. No reason appeared why the mortgage was invalid. The court said:

"The sale was effected by means of a written instru-

ment regularly executed by the proper officers of the company in pursuance of a resolution of the board of directors. At the meeting of the board five of the eight members were present and the action was unanimous, and has not since been objected to by anyone interested in the company. Under the circumstances disclosed by the testimony the appellant has no standing to question it."

Respectfully submitted.

A. W. GREEN,
LOCKWOOD HONORE',
F. M. PETERS,
Attorneys for Defendant in Error.

No. 97.
Sup. Ct. Brf. of Green v. Honore for

Office Supreme Court U. S.
FILED
NOV 17 1900
JAMES H. McKENNEY
Clerk

Filed Nov. 17, 1900.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 97.

MICHAEL F. DOOLEY, as Receiver, etc.,
Plaintiff in Error,
vs.
JAMES PEASE,
Defendant in Error.

Error to Circuit Court of Appeals, Seventh Circuit.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

(Filed by leave of Court.)

A. W. GREEN,
LOCKWOOD HONORE,
F. M. PETERS,
COUNSEL FOR DEFENDANT IN ERROR.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

1297

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

No. 97.

MICHAEL F. DOOLEY, as Receiver, etc.,
Plaintiff in Error,

vs.

JAMES PEASE,
Defendant in Error.

Error to Circuit Court of Appeals, Seventh Circuit.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

(Filed by leave of Court.)

I.

A GENERAL FINDING OF NOT GUILTY CONCLUDES ALL QUESTIONS AFFECTING THE CORRECTNESS OF THE DECISION OF THE LOWER COURT EXCEPT RULINGS UPON EVIDENCE.

It has been held over and over again that this court will not review mixed questions of law and fact.

Norris v. *Jackson*, 9 Wall., 125.
Dennistoun v. *Stewart*, 18 How., 565.
Jewell v. *Knight*, 123 U. S., 426.
Smith v. *Kraft*, 123 U. S., 436.
Fire Ins. Co. v. *Wickham*, 128 U. S., 426.

It has also been held so often in this court that a general finding is conclusive (except as to rulings of evidence) that a citation of authorities would be superfluous.

The statute fixing the duty of the court under a case submitted without a jury provides:

"The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

R. S. U. S., § 649.

It is submitted that the word "or" between the word "general" and the word "special" makes it necessary that the lower court, if it chooses to make a general finding, refrain from making special findings. It cannot make both.

The result of making both general and special findings is to impose upon the Supreme Court the duty of re-examining the facts set out in the *special* findings to see whether the court was erroneous in its *general* mixed finding of law and fact, which is included in the general finding of not guilty.

It is therefore submitted that where there is a general finding, it is improper to have special findings, and they should be disregarded, leaving the general finding conclusive as to all questions except questions affecting the admission of evidence.

This point appears to have been decided in *British Queen Mining Company* v. *Baker Co.*, 139 U. S., 222.

II.

THE FINDINGS BELOW ARE CONCLUSIVE THAT CHAFFEE DID NOT HAVE THE POWER TO MAKE THIS BILL OF SALE.

The findings in this regard are as follows:

"Chaffee (the president of the company) was not vested with authority to make this transfer by the charter of the company, nor by the by-laws, nor by any action of the board of directors, nor was his act ever ratified by the board of directors, or by the company, in any manner. He had never had authority vested in him at any time by the company to make this transfer or to make similar transfers. He had never made a transfer similar to this prior to starting on his trip, beginning April 22d, 1895, on which trip he purported to make the transfer in controversy.

"The bank knew and Dooley knew that this act was an attempted preference on Chaffee's part in contemplation of the insolvency and liquidation of the company.

"Chaffee had never during the business career of the company done any act in behalf of the company that would lead the bank or anyone else to suppose that he had been given the power by the company to dispose of its assets, by way of preference, in case of impending dissolution." (Rec., p. 15.)

The plaintiff in error, however, seems to claim that there is a peremptory conclusion of law which must override the foregoing findings and by reason of which it must be held that the company ratified Chaffee's act because they refused to take any action in regard to ratifying it.

The findings in this respect are:

"The directors of the Silk Company, on being told by Lucas, who was Dooley's attorney, that it was essential that they should ratify Chaffee's act in making the supposed transfer, refused to do so and took no action whatever in regard thereto. (Rec. p. 15, Par. 20.)"

"After the appointment of said Hayden as receiver and on or about the 29th day of April, 1895, said Chaffee met in the office of said Natchaug Silk Company at Willimantic, with all the directors of said corporation who were then living and were within the State of Connecticut, being three in number besides himself, the entire board of directors consisting of six members, of whom one, to-wit, Risley, was dead, and another was absent from the state. At said meeting said plaintiff and said Lucas were also present and said Chaffee reported to said directors present at said meeting the making of said bill of sale of said good in Chicago to the plaintiff above mentioned, and requested them to ratify the same, but said directors declined to take any action whatever in regard thereto, and neither expressed an approval nor disapproval of the act of said Chaffee in making said bill of sale." (Rec. p. 16; Par. 32.)

Plaintiff in error, in support of his proposition that there must be held to be a ratification because there was no positive dissent, cites numerous cases. But these cases have no application to the case at bar, for the reason that upon examination it will be found that in each of such cases the corporation in question, through its directors, knew that an act had been done in its name, and knowing this it either retained the benefit of the act or estopped itself from denying that it had ratified the act by sitting by, day by day, and seeing the other party to the arrangement constantly changing his position to his detriment, by reason of their failure to notify him that they did not consider the contract binding.

None of these cases have any application to the case at bar, because in our case the transaction was a pure gift or gratuity, which Chaffee purported to confer upon Dooley, receiver. At no time after the making of such transfer could Dooley have been any worse off by reason thereof than he would have been if the company had

never purported to act at all and to give him this gratuitous preference.

If, however, it should be thought that the failure to dissent within a reasonable time constited a ratification, then the finding that there was no ratification must be taken to be a finding that the reasonable time within which such dissent should have been expressed had not yet elapsed.

The date of the bill of sale was April 25th, and the date of the attachments was May 20th.

III.

THE BILL OF SALE WAS VOID BECAUSE THE GRANTOR REMAINED IN POSSESSION.

There has been a conflict of opinion in various jurisdictions as to whether a sale or transfer of goods, where the vendor remained in possession, was fraudulent *per se*, or whether such remaining in possession was merely an evidentiary fact, which, together with other facts, might assist in the determination as to whether the transfer was fraudulent or not.

In the State of Illinois the law has always been settled that a sale or transfer of chattels where the vendor remained in possession was fraudulent *per se*, and this is entirely irrespective of the question as to whether there was *in fact* any fraudulent intention between the parties or not. Such a transaction is absolutely void as to creditors, no matter how proper may have been the intentions of the parties participating therein.

This principle was decided in the early case of *Thornton* v. *Davenport*, 1 Scam., 296.

The last-named case, however, involved a transaction which was in effect a chattel mortgage, and the deed itself provided that the grantor should remain in possession for a certain length of time. The court, therefore, after declaring the law to be that a bill of sale without a transfer of possession from the vendor to the vendee was absolutely void, placed a limitation upon its decision, to the effect that if the retaining of possession was provided for by the deed itself, then the transaction was not fraudulent.

This of course was an illogical limitation upon the general rule, as was pointed out by the dissenting judge in that case, who contended that the fraud upon the public was just as great, whether the deed, which was a secret instrument betweent the parties, provided that the grantor might remain in possession or not, the public relying upon the outward appearance and being deceived by the fact that the vendor still retained possession.

This case was decided in December, 1836, but was not publicly reported until 1841. Three years later, the legislature of the state, recognizing that under the decision of the majority of the court in *Thornton* v. *Davenport*, a chattel mortgage might be made providing for retention of possession by the grantor which would be secret as far as the public was concerned, enacted a statute providing—

"That no mortgage on personal property hereafter executed shall be valid as against the rights and interests of any third person, unless possession of such personal property shall be delivered to and remain with the mortgagee or said mortgage be acknowledged and recorded, etc."

Laws of Ill., 1844–45, p. 44

Thus, ever since the passage of this statute, it has been the law in Illinois, both as to absolute bills of sale and as to chattel mortgages (unrecorded), that the failure of the grantor to turn over possession to the grantee rendered the deed absolutely void.

Dexter v. *Parkins*, 22 Ill., 143.
Reese v. *Mitchel*, 41 Ill., 365.
Mumford v. *Canty*, 50 Ill., 370.
Lemen v. *Robinson*, 59 Ill., 115.
Allen v. *Carr*, 85 Ill., 388.
Rozier v. *Williams*, 92 Ill., 187.
Bass v. *Pease*, 79 Ill. App., 308, at p. 313.

As to the Federal Courts.

The case of *Warner* v. *Norton*, 20 How., 448, was a case originally begun in the United States Circuit Court for the Northern District of Illinois, and was a case exactly like the one at bar. In that case the judge in the lower court took the view opposing that then held as the law in Illinois, and charged the jury that a sale where the vendor remained in possession was not fraudulent *per se*, but that the failure of the vendor to transfer the possession was merely evidence of fraud, and this decision was affirmed by the Supreme Court of the United States, this court deciding that the best authorities seemed to hold that the failure to transfer the possession should not make the transaction absolutely void, but that it was merely evidence of fraud. The cout did not discuss the question as to whether the law of Illinois should necessarily be adopted by the United States Court in cases coming from Illinois.

But the court proceeded to discuss the conflicting rules,

and decided in favor of the rule which it adopted in that case, independently of what the Illinois law might be on the subject. And, although the case of *Thornton* v. *Davenport* was cited by counsel, the court in its decision did not mention or refer to the case.

Since the case of *Warner* v. *Norton*, however, the the Supreme Court of the United States has expressly held that the Federal tribunals should adopt the law of the state in which the property is found when they are deciding questions based upon the rules of such state affecting the transfer of property within its limits, and in the case of *Green* v. *Van Buskirk*, 7 Wall., 139, which was substantially the same as the case at bar, the court held that the question as to whether the attaching creditors did or did not have the right to seize the goods depended upon the laws of Illinois affecting the transfer of property, and distinctly further held that the law of Illinois was that a sale of personal property, the vendor remaining in possession, was absolutely void. The same principle was announced in *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S., 664.

In *Green* v. *Van Buskirk* it was announced that the courts of New York must respect the attachment proceeding in Illinois, based upon the Illinois law, affecting sales of personal property, and in *Hervey* v. *Rhode Island Locomotive Works* the court held that attachment proceedings in Illinois, based upon the principle contended for here, must be respected by *the Federal tribunals.*

The court said, at page 673:

"These proceedings were valid in the first decision, where they take place, and must be respected by the Federal tribunal."

It only remains then to consider the meaning of the

words "The grantor remaining in possession," and this question need not delay us long, for it has been held in *Martin* v. *Duncan*, 156 Ill., 274, at page 280, and in *Second Nat'l. Bank* v. *Gilbert*, 174 Ill., 485, at page 491, that the grantor must be held to have remained in possession, unless he has *openly and notoriously* surrendered his possession to the grantee in a manner which will inform third persons that he has so surrendered his possession.

In *Martin* v. *Duncan*, *supra*, the court said:

"Up to May 16th the defendant in error had been in possession, as agent of his brother, and if, on May 28th, he was in possession for himself, the change in the character of the possession should have been indicated by such outward, open, actual and visible signs as could be seen and known to the public or persons dealing with the goods. * * * When the known and previously recognized agent of an alleged vendor remains in possession, the appearance to the world is the same as though the vendor himself remained in possession, unless there are substantial and visible signs of a change of title."

In *Second Nat'l Bank* v. *Gilbert*, *supra*, the court said:

"When the known and previously recognized agent of an alleged vendor remains in possession of personal property the appearance to the world is the same as though the vendor himself remained in possession, unless there are substantial and visible signs of a change of title. The change in the character of the possession should be indicated by such outward, open, actual and visible signs as can be seen and known to the public or persons dealing with the property (citing cases)."

This, then, being the law of Illinois, let us consider the findings in our case:

"Said store had for several years prior thereto [the execution of the bill of sale] been operated by said Natchaug Silk Company as a store for the sale to dealers

of its manufactured goods through one H. L. Stanton, who, down to said April 25, 1895, had acted as its agent for that purpose." (Rec. p. 13; Par. 11.)

"On the morning of April 26th, 1895, an attorney employed by the said plaintiff (Dooley) called at said store, purported to take possession of said goods in the name of the plaintiff, employed said Stanton as agent of the plaintiff to sell said goods." (Rec. p. 14; Par. 12.)

"There was no change in the title to or possession of said goods which was visible, open or notorious, down to the date of the attachments." (Rec. p. 15; Par. 14.)

"There was nothing in the appearance outside or inside to indicate that there had been any change in the title or possession to the goods on or after April 25th and until May 20th, the time of the attachment." (Rec. p. 15; Par. 23.)

"The same persons (being five or six in number) remained in the store performing, after the transfer to Dooley, apparently the same duties they had been performing prior to April 25th."

"The salesmen were instructed not to inform the public nor customers of the transfer to Dooley, and they did not do so." (Rec. p. 15; Par. 24, 25.)

"The signs of the Natchaug Silk Company on the outside and inside of the store were not changed between April 24th and the time of the levy of the attachment." (Rec. p. 15; Par. 22.)

"No advertisement was made of the transfer to Dooley nor was any public notice given thereof. There was nothing to inform the public that any change had taken place in the ownership or possession of the goods between April 24, 1895, and the levy of the attachments on May 20, 1895. The change of ownership was not open or visible or notorious." (Rec. p. 16.)

Thus we have a clear case of a bill of sale (or a chattel mortgage, if the court chooses to so construe it) where the grantor, according to the law of Illinois, still remained in possession, and hence the bill of sale (or chattel mortgage) is void.

We may say in this connection that we do not rely in

this case upon either of the statutes cited in the brief for plaintiff in error, at page 31 and at page 34, nor indeed do we rely upon any statute (unless it be the statute in relation to chattel mortgages) for under the rule laid down in *Thornton* v. *Davenport* (*supra*), which is therein declared to be the *common law*, supplemented by the chattel mortgage act, it is the law of Illinois that no transfer of chattels, whether by bill of sale or chattel mortgage, is valid unless the grantor delivers possession to the grantee.

The statutes cited by the plaintiff in error in his brief above alluded to, if they afford remedies to creditors, are merely cumulative to the remedies which, as we have pointed out, are afforded by the rule in *Thornton* v. *Davenport*, and by chattel mortgage act of Illinois.

IV.

THE DOCUMENT ALTHOUGH ON ITS FACE A BILL OF SALE WAS INTENDED TO BE A CHATTEL MORTGAGE AND HENCE IS VOID.

The courts of Illinois will look at the circumstances attending the execution of an apparent bill of sale and will determine whether it was in fact an absolute deed or merely a chattel mortgage.

Martin v. *Duncan*, 156 Ill,, 274.
2nd Nat'l. Bank v. *Gilbert*, 174 Ill., 485.
Hervey v. *R. I. Locomotive Works*, 93 U. S., 664.

(In the latter case a lease was construed as a chattel mortgage.)

In our case the document appears to have been in-

tended as a chattel mortgage. The findings in this regard are:

"Prior to or about the time of his appointment as such receiver, the plaintiff requested of said Chaffee, as president and general manager of said Natchaug Silk Company, that said Natchaug Silk Company should give *security* for the payment of its indebtedness to the First National Bank of Willimantic, and said plaintiff then and there told said Chaffee that unless said *security* was given, he, the plaintiff, would close said silk company up.

"Immediately thereafter, said Chaffee came to the City of Chicago with one Solomon Lucas, an attorney at law, who had been employed by the plaintiff to look after the interests of the First National Bank of Willimantic, and executed in the name of said Natchaug Silk Company and delivered to said Lucas on behalf of the plaintiff a bill of sale, etc. (Rec. p. 12, par. 9, 10.) * * * At the time the said bill of sale was executed and delivered by said Chaffee to said Lucas said Chaffee directed said Lucas to have the said goods that were included in said bill of sale sold and the proceeds of such sale applied by said plaintiff as a payment upon the indebtedness. (Rec. p. 13; par. 11.) * * * No deduction from or cancellation of the debt to the bank or its receiver, Dooley, was made at the time of or by reason of the giving of said bill of sale; nor was any deduction from or cancellation of said debt made by said Dooley in his proof of claim against the receiver of said Silk Company filed April 7, 1896 [nearly one year later] on account of or by reason of the giving of this bill of sale, although he had received the sum of $7,000 out of the sale of a portion of these goods." (Rec. pp. 17–18, par. 37.)

We have here then in the findings a clear case of a document absolute in form given and intended to be merely security for an indebtedness or in effect a chattel mortgage.

This was clearly fraudulent and void and would have warranted the Circuit Court of Appeals in affirming the

judgment of the lower court, (even if the two previous points in regard to Chaffee's authority and the vendor remaining in possession were held to be not sufficient) on the ground that an absolute bill of sale intended as a mortgage is fraudulent *per se*.

Beidler v. *Crane*, 135 Ill., 92.
Watkins v. *Arms*, 64 N. H., 99.
First Nat. Bank v. *Co.*, 43 Mo. App., 561.
Campbell v. *Davis*, 85 Ala., 56.
Sims v. *Gaines*, 64 Ala., 392.
Winkley v. *Hill*, 9 N. H., 31.
Halcome v. *Ray*, 1 Ired., 340.
Friedley v. *Hamilton*, 17 S. & R., 70.

Respectfully submitted.

A. W. GREEN,
LOCKWOOD HONORE',
F. M. PETERS,
Attorneys for Defendant in Error.

Supreme Court of the United States.

No. 97.—October Term, 1900.

Michael F. Dooley, as Receiver of the First National Bank of Willimantic, Connecticut, Plaintiff in Error, *vs.* James Pease. } In error to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 21, 1901.]

This was an action brought on June 25, 1895, in the Circuit Court of the United States for the Northern District of Illinois, by Michael F. Dooley, as receiver of the First National Bank of Willimantic, Connecticut, against James Pease, a citizen of the State of Illinois. The declaration complained of a trespass by the defendant, who was sheriff of Cook County, Illinois, in levying upon and taking possession of a stock of silk goods, in a store room in the city of Chicago, which were claimed by the plaintiff to belong to him. After a plea of not guilty the case was, by consent, tried without a jury.

On May 28, 1897, judgment, under the findings, was entered in favor of the defendant.

The case was then taken to the Circuit Court of Appeals for the Seventh Circuit, and on July 6, 1898, the judgment of the Circuit Court was affirmed. A writ of error was thereupon allowed from this court.

Mr. Justice Shiras delivered the opinion of the Court.

Among other questions passed upon by the Circuit Court was whether the alleged sale of goods by the Natchaug Silk Company, through J. D. Chaffee, its president, to Dooley, as receiver of the First National Bank of Willimantic, either as payment in part, or as security for payment, of the debt of the silk company to the bank, was accompanied or followed by the open visible and notorious change of possession, required by the law of the State of Illinois.

It is conceded, or, if not conceded, we regard it as well established, that the policy of the law in Illinois will not permit the owner of personal property to sell it and still continue in possession of it, so as to exempt it from seizure or attachment at the suit of creditors of the vendor. If between the parties, without delivery, the sale is valid, it has no effect on third persons who, in good faith, purchase it, and an attaching creditor stands in the light of a purchaser, and as such will be protected. (*Thornton* v.

Davenport, 1 Scammon, 296; *Shawn* v. *Jones*, 16 Ill. 117; *Martin* v. *Dryden*, 1 Gilman, 187; *Burnell* v. *Robertson*, 5 Id. 282.)

It is equally well established that the courts of the United States regard and follow the policy of the State law in cases of this kind. "Any other rule," said this court in *Green* v. *Van Buskirk*, (7 Wall. 139,) "would destroy all safety in derivative titles and deny to a State the power to regulate its personal property within its limits."

In *Henry et al.* v. *R. I. Locomotive Works*, (93 U. S. 664, 671,) it was said:

"It was decided by this court in *Green* v. *Van Buskirk*, (15 Wall. 307; 7 Id. 139,) that the liability of property to be sold under legal process, issuing from the courts of the State where it is situated, must be determined by the law there, rather than of the jurisdiction where the owner lives. These decisions rest on the ground that every State has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. He has no absolute right to have the transfer of property, lawful in that jurisdiction, respected in the courts of the State where it is found, and it is only on a principle of comity that it is ever allowed. But this principle yields when the laws and policy of the latter State conflict with those of the former.

"The policy of the law in Illinois will not permit the owner of personal property to sell it, either absolutely or conditionally, and still continue in possession of it. Possession is one of the strongest evidences of title to this class of property, and cannot be rightfully separated from the title, except in the manner pointed out by statute. The courts of Illinois say that to suffer without notice to the world the real ownership to be in one person, and the ostensible ownership in another, gives a false credit to the latter, and in this way works an injury to third persons. . . . Secret liens which treat the vendor of personal property, who has delivered possession of it to the purchaser as the owner until the payment of the purchase money, cannot be maintained in Illinois. They are held to be constructively fraudulent as to creditors, and the property, so far as their rights are concerned, is considered as belonging to the purchaser holding the possession. (*McCormick* v. *Haddon*, 37 Ill. 370; *Ketchum* v. *Watson*, 24 Ill. 591.)" (*Pullman Car Co.* v. *Pennsylvania*, 141 U. S. 22.)

It being, then, established that, under the policy of the law of Illinois, in order to protect the goods in question from attachment by creditors of the Natchaug Silk Company, an attempted sale must be accompanied by a change of possession, which change must be visible, open or notorious, did the facts of the transaction between the silk company and Dooley show such a change of possession?

The findings of the Circuit Court on this feature of the case were as follows:

"Said store had for several years prior to the sale to Dooley been operated by said Natchaug Silk Company as a store for the sale to dealers of its manufactured goods through one H. L. Stanton, who down to the date of

said sale, April 25, 1895, had acted as its agent for that purpose, and at the time said bill of sale was executed and delivered by said Chaffee to said Lucas said Chaffee directed said Lucas to have the said goods, that were included in said bill of sale, sold and the proceeds of such sale applied by said plaintiff as a payment upon the indebtedness of said Natchaug Silk Company to said First National Bank of Willimantic.

"On the morning of April 26, 1895, an attorney employed by said plaintiff called at said store, purported to take possession of said goods in the name of the plaintiff, employed said H. L. Stanton as agent of the plaintiff to sell said goods and remit the proceeds of such sales to the plaintiff, and took from said Stanton a receipt stating that he, said Stanton, had received said stock of goods for the plaintiff and subject to the plaintiff's directions. Immediately thereafter said Stanton caused the said stock of goods to be insured in the name of the plaintiff, and opened a new set of books for the purpose of keeping an account of the sale and disposition of said goods and of the expenses of said Stanton in and about the making of such sale, and also made an inventory of the said goods and delivered the same to said attorney for the plaintiff. From that date said Stanton understood himself to be acting solely as the agent of the plaintiff. A portion of the said stock of goods was sold by said Stanton to various persons, to whom the said goods were billed in the name of the plaintiff, and the proceeds of said sales, amounting to about $7,000, were received by said Stanton and placed to the credit of the plaintiff. No change was made from April 25, 1895, until after May 20, 1895, in the signs on the outside of the store, which signs were 'Natchaug Silk Company.' . . .

"After the making of said bill of sale there was no change in the possession of the goods other than as above named, but they remained in the custody of the same persons who had theretofore been in charge of them for the silk company, and they were apparently in the possession of the silk company, so far as appeared to the public, and were sold in the same way as theretofore down to the day of the attachment. There was no change in the title to or possession of said goods which was visible, open or notorious, down to the date of the attachment, unless the facts hereinbefore and hereinafter specifically stated did as matters of law constitute a visible, open and notorious change of possession. . . . The signs of the Natchaug Silk Company, on the outside and inside of the store, were not changed between April 24th and the time of the levy of the attachments. There was nothing in the appearance of the store, outside or inside, to indicate that there had been any change in the title or possession to the goods on or after April 25th and until May 25th, the time of the attachment. The same persons, being five or six in number, remained in the store performing, after the transfer to Dooley, apparently the same duties they had been performing prior to April 25th. The salesmen were instructed not to inform the public nor customers of the transfer to Dooley, and they did not do so, but all the goods that were shipped from said store were billed to customers in the name of the plaintiff and not in the name of the silk company. Orders kept coming in addressed to the Natchaug Silk Company after April 25th for several weeks, in all respects as they had come in prior to that, and these orders were appropriated and filled by Stanton out of the stock in the store. The office fixtures were not attempted to be transferred to Dooley, that they were used in conducting the business after April 25th, in all respects as before, by Stanton in the

sale of the goods. Stanton's books of account and papers in relation to sales after April 25th were all kept in a safe belonging to the Natchaug Silk Company, and which had its name painted in large letters thereon and which was standing in the store. No advertisement was made of the transfer to Dooley, nor was any public notice given thereof, unless as a matter of law the facts hereinbefore and hereinafter stated constituted such public notice. There was nothing to inform the public that any change had taken place in the ownership or possession of the goods between April 24, 1895, and the levy of the attachment on May 20, 1895, unless as matter of law the facts hereinbefore and hereinafter mentioned constituted sufficient information to the public of such change. The change of ownership was not open, or visible, or notorious, unless as matter of law the facts hereinbefore or hereinafter stated constituted open, or visible, or notorious change of ownership."

We have thus stated all the findings of fact relative to the question of the change of possession, shown by the record.

Where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different. (*Stanley* v. *Supervisors*, 121 U. S. 547.)

Errors alleged in the findings of the court are not subject to revision by the Circuit Court of Appeals, or by this court, if there was any evidence upon which such findings could be made. (*Hathaway* v. *National Bank*, 134 U. S. 498; *St. Louis* v. *Retz*, 138 U. S. 241; *Runkle* v. *Burnham*, 153 U. S. 225.)

We agree with the Circuit Court of Appeals in its statement that "the facts stated in the findings were evidentiary only, and, instead of being conclusive of publicity, tended rather to show intentional concealment; that they were certainly sufficient, even if we were required to look into the evidence, to support the finding of the ultimate fact." (60 U. S. App. 248.)

Applying, then, the settled law of Illinois to the facts as found, the conclusion reached by the Circuit Court, and affirmed by the Circuit Court of Appeals, that the sale was void as against the attaching creditors, must be accepted by this court.

This conclusion disposes of the case, and renders a consideration of the other questions presented by the findings unnecessary.

The judgment of the Circuit Court of Appeals is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.